FILED
MAY 26 1915
JAMES D. MAHER
CLERK

IN THE

Supreme Court of the United States.

October Term, 1914. No. 464. 1382

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, Co-partners, trading under the firm name of W. F. JACOBY & COMPANY,

Defendants-in-Error.

MOTION TO ADVANCE.

W. F. Jacoby and Isaac C. Weber, the petitioners herein, move the Court to advance this cause upon the docket for final hearing, for the following reasons:

That the matter to be herein determined is a case, arising under the Act to Regulate Commerce, to enforce the payment of an award made against the defendant in favor of the petitioners in the sum of $21,094.39, with interest thereon at the rate of six per cent. per annum from June 28, 1907, for certain unjust and unlawful discriminatory practices found by the Interstate

Commerce Commission to have been used and committed by Pennsylvania Railroad Company, plaintiff-in-error, a common carrier engaged in interstate commerce, to the damage of petitioners, who were shippers of coal upon the line of said railroad carrier during the period from April 1, 1904, and October 18, 1905, when said practices were in force. That the original petition was filed with the Interstate Commerce Commission in June, 1907, and the final award was made by the Commission on March 11, 1912, and that suit was brought on said award by petition filed on July 19, 1912, and that judgment was rendered on a verdict in favor of petitioners, in the sum of $28,572.54, being the amount of said award, on May 21, 1913.

That by reason of unavoidable delay, said cause has been pending before the Interstate Commerce Commission and in the Courts of the United States since June, 1907. That if this cause shall take its ordinary course, considerable time may yet elapse before petitioners may be able to obtain a final judgment upon said award.

That the chief matters in question in the cause were certified to this Court from the United States Circuit Court of Appeals for the Third Circuit, on February 26, 1914, and are now before this Court. That these questions were in effect decided in favor of petitioners in certain recent decisions of this Court, in which the same points came before the Court for adjudication in cases brought upon writ of error from the United States Circuit Court of Appeals for the Third Circuit.

That the subsidiary questions arising in the case are matters involving the construction of the Act to Regulate Commerce and other acts of Congress.

That the facts are admitted upon the record, which

this Court has been, by petition, requested to have brought before it for final determination as if on appeal or writ of error.

That counsel are, on both sides, fully prepared, by reason of having presented their argument heretofore to the Honorable Judges of the Circuit Court of Appeals for the Third Circuit, to present this cause fully without requiring the usual time for the preparation of new briefs.

That by reason of the peculiar circumstances above detailed, petitioners move the Court to advance this cause to such early hearing as may be convenient to this Honorable Court.

WM. A. GLASGOW, JR.,
Counsel for Petitioners.

IN THE
SUPREME COURT OF THE UNITED STATES.

October Term, 1914. No. 464.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, Co-partners, trading under the firm name of W. F. JACOBY & COMPANY,
Defendants-in-Error.

NOTICE.

To JOHN G. JOHNSON,
Attorney for the Pennsylvania Railroad Company.
Sir:

You will please take notice that on the ..1st.. day of ....January...., 1915, at twelve o'clock noon or as soon thereafter as counsel may be heard, the foregoing Motion will be submitted to the Supreme Court of the United States at its usual place for holding its sessions, in the Capitol at Washington, D. C., for its consideration and action, at which time and place you will please take such action in the premises as you may be advised.

(Sgd.) Wm. A. Glasgow, Jr.
Counsel for Petitioners.

ADMISSION OF SERVICE.

Service of the foregoing Motion is acknowledged this .....18th..... day of .....May....., 1915.

(Sgd.) John G. Johnson
Counsel for Plaintiff-in-Error.

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IN THE

Supreme Court of the United States.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff in Error,

vs.

W. F. JACOBY & COMPANY,
Defendant in Error.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR PLAINTIFF IN ERROR.

F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON,
For Plaintiff in Error.

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In the Supreme Court of the United States.

OCTOBER TERM, 1915. NO. 139.

Pennsylvania Railroad Company, Plaintiff in Error,

vs.

W. F. Jacoby & Company, Defendant in Error.

BRIEF FOR PLAINTIFF IN ERROR.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

STATEMENT OF THE CASE.

The present action was instituted by the defendants in error in the District Court of the United States for the Eastern District of Pennsylvania to recover the amount of an award made in their favor by the Interstate Commerce Commission.

In the period between April 1, 1904, and October 15, 1905, the defendants in error had been the owners and operators of a mine, the output of which was shipped over

the railroad of the plaintiff in error. In this period the plaintiff in error had made a *pro rata* or percentage distribution of its cars among the mines located on its road, and the defendants in error, conceiving that they had not received the number of cars which they were entitled to, instituted a proceeding in July, 1907, before the Interstate Commerce Commission which eventuated in the award upon which the present action was based.

In October, 1905, the defendants in error had sold their mine, and consequently in the proceeding before the Commission no order was sought which would regulate or define the method of car allotment and distribution to be thereafter pursued by the plaintiff in error; the power of the Commission was invoked for the purpose merely of securing an award because of the non-receipt of cars which the defendants in error claimed they would have received had a proper system of distribution been pursued by the plaintiff in error during a period of time which had terminated a year and nine months prior to the commencement of the proceeding.

The Commission first determined what system of distribution should have been pursued in the period in question, and then found that if this system had been pursued the defendants in error would have received as their share of those available for distribution in such period, cars which would have enabled them to ship in the first year of the period, viz., from April 1, 1904, to April 1, 1905, 74,126.25 tons, and in the balance of the period, that is, between April 1, 1905, and October 15, 1905, 37,078.65 tons. These amounts were, respectively, 59.9 per cent. and 59.6 per cent. of the mine's shipping capacity, as determined by the rating given to it by the plaintiff in error and confirmed by the Commission as fair.

The reports and orders of the Commission failed to disclose what was the basis of the Commission's conclusion that in the two periods named the defendants in error should have received cars of a capacity equal to the above percentages of their mine's rated capacity.

It was established by the testimony that the aggregate capacity of the cars of all classes placed at the mines located in the Region in which the defendants in error's mine was located—the Tyrone Region—had been equal in the period between April 1, 1904, and April 1, 1905, to 30.3 per cent. of the rated capacity of the mines, and in the period between April 1, 1905, and October 15, 1905, to 23.9 per cent. of such capacity.

The cars placed at the mines in the Tyrone Region comprised 25,474 so-called "fuel" cars of the plaintiff in error, which had been placed at the mines from which it was drawing its fuel supply, 33,539 individual or private cars, which had been placed at the mines of the owners of the cars, and 53,454 cars available for distribution among all shippers. Treating all of these cars as distributable, and ignoring the consideration that a large number of them were cars which had to be placed at the mines of their owners, and that a large number were fuel cars which could lawfully be placed at the mines which were furnishing fuel coal to the plaintiff in error, each mine in the Region, had all these cars been distributed, would have received cars, equal in capacity to the percentages above given, viz., 30.3 per cent. and 29.3 per cent. of its rated capacity.

While the Commission did not indicate how it had reached the conclusion that the defendants in error should have reached in these same periods 59.9 per cent. and 59.6 per cent of their mine's rated capacity, the basis for this conclusion was established upon the trial of the case, and it was this:—

The records of the plaintiff in error, showing the distribution made by it of its cars, referred to in the testimony as its "Car Distribution Sheets," had been submitted to the defendants in error for their examination.

The defendants in error had selected a relatively small number of the total number of mines located in the Region—about 20 out of a total of about 150—whose shipments in the earlier period, amounted to about 40

per cent. and in the later period, to about 35 per cent. of the total Region shipments, and had prepared an exhibit which showed that in the two periods in question the average of the shipments from these mines had amounted to 59.9 per cent and 59.6 per cent. respectively of their aggregate ratings, and this exhibit was submitted to the Commission as embodying the defendants in error's claim as to the percentage of their mine's aggregate ratings which they ought to have received cars for.

The cars shown by this exhibit to have been placed at the mines embraced therein included cars of all classes, as well those which were distributable as those which were not, due to the fact that they were individual or fuel cars. The exhibit did not disclose how many were individual or fuel cars, but it was established by the testimony that the cars placed at the only mines as to which any attempt had been made to establish preferred treatment—those of the Berwind White Coal Mining Company—had been substantially all fuel or individual cars. The exhibit showed that in the period between April 1, 1904, and April 1, 1905, 13,452 cars had been placed at these mines, and of these all but 460 had been either fuel or individual cars, and in the later period out of 7154 cars placed, all had been fuel or individual cars with the exception of 60.

The Commission allowed as damages the profit which the defendants in error would, in the judgment of the Commission, have realized from the sale of the additional coal which, under the Commission's theory, they should have received cars for the shipment of, and also the enhanced cost of producing that which they had mined and sold, due to the curtailment of the mine's output as the result of the non-receipt of additional cars. The damages, ascertained in the manner indicated, were computed by the Commission at $21,094.39, and this amount, with interest, the plaintiff in error was directed to pay.

As already stated, the defendants in error had after the close of the period of the action sold their mine, and

had thus realized something for the coal which they had been prevented from shipping due to lack of cars for the shipment of the same. It was contended that this fact should be taken into consideration in determining the extent of the loss sustained by the defendants in error, due to their inability to dispose of the coal in the period of the action. This contention was thus disposed of by the Commission:

> "We further find that the Complainants in the sale of their mine realized a profit of $7500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded."

The award not having been paid, the present action r the recovery of the same was instituted.

To the petition filed by the defendants in error a demurrer was interposed which challenged the right of the Commission to make the award upon the ground that jurisdiction to award damages in other than rate cases had not been conferred upon that body. This demurrer was based upon a view of the Commission's powers which was in accordance with that held by a majority of the Commission itself. The District Court, however, overruled this demurrer.

Upon the trial the defendants in error, over the objection of the plaintiff in error, put in evidence and read to the jury the reports of the Commission and the orders made thereon. The objection of the plaintiff in error to the admission of these reports and orders was based upon the fact that they contained not mere findings of fact, but arguments, conclusions of law and other extraneous matters hurtful to the plaintiff in error.

No other testimony except some purely formal evidence was introduced by the defendants in error.

The plaintiff in error offered in evidence the evidence and exhibits before the Commission. Objection, however,

was made to the admission of these, and they were excluded by the trial Judge. Subsequently, however, the exhibits which have been already referred to were admitted in evidence, and other testimony was introduced for the purpose of establishing what had been the Region distribution of cars in the period of the action.

Upon the case as thus made up the plaintiff in error contended that the Commission had not jurisdiction to make the award; that the award as disclosed by the order of the Commission was for a sum which the Commission had not found was due and owing by the plaintiff in error; and that the Commission had used an erroneous method for determining the percentage of their mine's rating which the defendants in error should have received in the period of the action, as this should have been determined with reference, not to the percentage of certain mines, but with reference to the region percentage.

The Court overruled these contentions, so far as they related to the validity and effectiveness of the Commission's award, sustained the contention that the defendants in error's percentage was to be ascertained with reference to the region percentage, but declined to instruct the jury that the Commission's percentages were, therefore, erroneous, and this even though the jury should find that these percentages were determined with reference not to the region percentage of distribution, but with reference to the number of cars which had been received by certain mines selected for the purposes of the case by the defendants in error from all those which were comprised in the region.

The jury rendered a verdict for the full amount of the award with interest. Thereafter application was made to the Court for an allowance of counsel fees to counsel for the defendants in error, both for services rendered upon the trial in the Court below and in the proceeding before the Commission. Objection was made on behalf of the plaintiff in error to the allowance of any counsel fees for services before the Commission,

and to the allowance of a larger sum for services before the Court than $500.

The Court allowed $2500 for services in the proceeding before the Commission and a like sum for services in the lower Court.

ASSIGNMENTS OF ERROR.

I.

The learned trial Judge erred in admitting in evidence the Report of the Interstate Commerce Commission of May 7, 1910, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, *vs.* The Pennsylvania Railroad Company, No. 1139.

II.

The learned trial Judge erred in admitting in evidence the Order of the Interstate Commerce Commission of May 7, 1910, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, *vs.* The Pennsylvania Railroad Company, No. 1139.

III.

The learned trial Judge erred in admitting in evidence the Supplemental Report of the Interstate Commerce Commission of March 11, 1912, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, *vs.* The Pennsylvania Railroad Company, No. 1139.

IV.

The learned trial Judge erred in admitting in evidence the Supplemental Order of the Interstate Commerce Commission of March 11, 1912, in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, *vs.* The Pennsylvania Railroad Company, No. 1139.

V.

The learned trial Judge erred in refusing to admit in evidence the testimony and exhibits appearing in the case of W. F. Jacoby and Isaac C. Weber, co-partners, trading as W. F. Jacoby & Company, *vs.* The Pennsylvania Railroad Company, before the Interstate Commerce Commission, No. 1139.

VI.

The learned trial Judge erred in refusing to affirm the first point submitted by the defendant, as follows:—

> "1. The Interstate Commerce Commission was without authority to make the award upon which the action is based, as its jurisdiction does not extend to the consideration and adjudication of claims for damages or reparation of the character of that embraced in the present action. The plaintiffs, therefore, are not entitled to recover, and the verdict must be for the defendant."

VII.

The learned trial Judge erred in refusing to affirm the second point submitted by the defendant, as follows:—

> "2. The award made by the Commission is invalid because there was left open for further consideration the question whether the whole amount awarded was properly payable to the plaintiffs."

VIII.

The learned trial Judge erred in refusing to affirm the third point submitted by the defendant, as follows:—

> "3. To justify the Commission in making the award for the recovery of which this action has been brought, it must have been shown or established to its satisfaction by the evidence adduced before it that the plaintiffs had not received their proper share of

the cars placed by the defendant, in the distribution of which the plaintiffs were entitled to participate, and which were used for interstate commerce or transportation. It appears that no evidence was presented to the Commission bearing upon this point, and that the award of the Commission was based upon the theory that whether the plaintiffs had been subjected to discrimination forbidden by the Interstate Commerce Act was to be determined by ascertaining whether they had received their proper share of all cars in the distribution of which they were entitled to participate, and not merely their share of the cars used for interstate commerce or transportation. The award consequently was invalid, and the plaintiffs are not entitled to recover."

IX.

The learned trial Judge erred in refusing to affirm the fourth point submitted by the defendant, as follows:—

"4. The award of the Interstate Commerce Commission is based upon the conclusion that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings for 275 days, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine rating for 138¼ days. It is apparent that this conclusion of the Commission was based upon the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have

been placed at the plaintiffs' mine, the basis for the Commission's award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

X.

The learned trial Judge erred in refusing to affirm the fifth point submitted by the defendant as follows:—

"5. It has been affirmatively established by the evidence adduced upon the part of the defendant that if distribution had been made of its cars in accordance with the method prescribed by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9 per cent. of the rating of their mine, and in the period between April 1, 1905, and October 18, 1908, cars equal in capacity to 59.6 per cent. of the rating of their mine. As the award of the Commission was based upon the theory that cars equal in capacity to these percentages should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover."

XI.

The learned trial Judge erred in refusing to affirm the sixth point submitted by the defendant, as follows:—

"6. It appears that there were included in the cars placed at the mines which the plaintiffs' testimony tended to show had received cars equal in capacity to 59.9 per cent. and 59.6 per cent. in the two periods of the aggregate of their mines' rating, individual or private cars of shippers, fuel cars of the defendant, and fuel cars of other railroad companies. The plaintiffs were not entitled to participate in the distribution of cars of either of these three classes, and consequently the percentages which those selected mines received should

not have been used as the basis for ascertaining the number of cars which the plaintiffs should have received, even upon the assumption that the number of cars placed at these selected mines furnished the standard by which the number should be ascertained which the plaintiffs should have received. The adoption, therefore, by the Interstate Commerce Commission of the percentages received by these mines as the standard for the ascertainment of the number which the plaintiffs should have received was an error, and the award made in favor of the plaintiffs was consequently invalid."

XII.

The learned trial Judge erred in refusing to affirm the seventh point submitted by the defendant, as follows:—

"7. Under the law and the evidence the plaintiffs are not entitled to recover, and your verdict should be for the defendant."

XIII.

The learned trial Judge erred in refusing to affirm the eighth point submitted by the defendant, as follows:—

"8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings, and in the period between April 1, and October 18, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those com-

prised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9 per cent, and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

XIV.

The learned trial Judge erred in refusing to affirm the ninth point submitted by the defendant, as follows:—

"9. If the jury find that if the defendant had made distribution of its cars in accordance with the method prescribed as proper by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1, 1905, cars equal in capacity to 59.9 per cent of the rating of their mine, and in the period between April 1, 1905, and October 18, 1905, cars equal in capacity to 59.6 per cent. of the rating of their mine, and that the award of the Commission was based upon the theory or conclusion that cars equal in capacity to these percentages, respectively, should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover."

XV.

The learned trial Judge erred in refusing to affirm the tenth point submitted by the defendant, as follows:—

"10. The rating for purposes of car distribution given by the defendant to the plaintiff's mine was 450 tons a day, the equivalent of 18 cars. This was a fair and proper rating, and subjected the plaintiffs to no undue or unjust discrimination."

XVI.

The learned trial Judge erred in refusing to affirm the eleventh point submitted by the defendant, as follows:—

"11. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 232,517 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 66,504. The cars thus delivered were, therefore, equal to 28.5 per cent. of the ratings. That in this same period the plaintiffs received cars equal to 28 per cent. of their mine's rating. Had they received cars equal to the region rating, viz., 28.5 per cent., they would have received additional cars equal to 00.5 per cent. of the aggregate of their mine's rating, and as this was 4301 cars, they would have received 22 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region) regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XVII.

The learned trial Judge erred in refusing to affirm the twelfth point submitted by the defendant, as follows:—

"12. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region (excluding those in the Snow Shoe Region) aggregated 152,934 cars, and that the cars of all classes delivered by the defendant at those mines aggregated 45,963 The cars thus delivered were, therefore, equal to 30.1 per cent. of the ratings. That in this same period the plaintiffs received cars equal to 23.9 per cent. of their mine's rating. Had they received cars

equal to the Region rating, viz., 30.1 per cent., they would have received additional cars equal to 6.2 per cent. of the aggregate of their mine's rating, and as this was 2346 cars, they would have received 146 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (excluding therefrom the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of those cars they were not entitled to participate."

XVIII.

The learned trial Judge erred in refusing to affirm the thirteenth point submitted by the defendant, as follows:—

"13. The evidence has established that in the year ending April 1, 1905, the ratings of all the mines in the Tyrone Region (including those in the Snow Shoe Region) aggregated 255,617 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 77,430. The cars thus delivered were, therefore, equal to 30.3 per cent. of the rating. That in this same period the plaintiffs received cars equal to 28 per cent. of their mine's rating. Had they received cars equal to the region rating, viz., 30.3 per cent, they would have received additional cars equal to 2.3 per cent. of the aggregate of their mine's rating, and as this was 4301 cars, they would have received 98 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, and if they had been entitled to their *pro rata* share of

all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XIX.

The learned trial Judge erred in refusing to affirm the fourteenth point submitted by the defendant, as follows:—

"14. The evidence has established that in the period between April 1, and October 18, 1905, the ratings of all the mines in the Tyrone Region (including those in the Snow Region) aggregated 166,434 cars, and that the cars of all classes delivered by the defendant at these mines aggregated 49,834. The cars thus delivered were, therefore, equal to 29.9 per cent. of the ratings. That in this same period the plaintiffs received cars equal to 23.9 per cent. of their mine's rating. Had they received cars equal to the region rating, viz., 29.9 per cent., they would have received additional cars equal to 6 per cent. of the aggregate of their mine's rating, and as this was 2348 cars, they would have received 141 cars in addition to those which they did receive. This number constitutes the maximum number of cars which the plaintiffs would have been entitled to receive in this period in addition to those actually delivered to them, if they had been entitled to their *pro rata* share of all cars placed by the defendant at the mines in the Tyrone Region (including the mines in the Snow Shoe Region), regardless of the consideration that in the distribution of some of these cars they were not entitled to participate."

XX.

The learned trial Judge erred in refusing to affirm the nineteenth point submitted by the defendant, as follows:—

"19. The damages, if any, sustained by the plaintiffs consequent upon their liability to mine and ship an additional amount of coal, cannot properly be measured by the estimated profit which would have accrued to them on such additional output. As the plaintiffs have presented no evidence from which the jury can ascertain or measure the damages upon any other basis, the recovery must be confined to nominal damages."

XXI.

The learned trial Judge erred in refusing to affirm the twentieth point submitted by the defendant, as follows:—

"20. There is no evidence that would warrant the jury in finding that the plaintiffs, under the theory of distribution prescribed as proper by the Interstate Commerce Commission, were entitled the period of the action, to any more cars than they received, because no evidence has been presented which would warrant the jury in finding that the plaintiffs had received in this period fewer cars than they were entitled to if in arriving at the number of cars for distribution among shippers generally, there were to be excluded the private or individual cars of shippers, the fuel cars of the defendant, and the fuel cars of other Railroad Companies consigned by them to certain mines."

XXII.

The learned trial Judge erred in refusing the defendant's motion for judgment *non obstante veredicto* upon the whole record.

XXIII.

The learned trial Judge erred in allowing a counsel fee for the services of the plaintiff's counsel in the proceeding before the Interstate Commerce Commission.

XXIV.

The learned trial Judge erred in allowing a counsel fee of $2500 for the services of the plaintiffs' counsel before the Interstate Commerce Commission.

XXV.

The learned trial Judge erred in allowing a counsel fee of $2500 for the services of the plaintiffs' counsel before the learned trial Court.

XXVI.

The learned trial Judge erred in entering judgment in favor of the plaintiffs, against the defendant, upon the verdict of the jury.

ARGUMENT.

Evidence Adduced by Defendants in Error Insufficient to Establish a *Prima Facie* Case.

The defendants in error, in order to maintain their right to recover, were required to establish by competent proof all facts necessary to support their right to the damages claimed by them.

The Interstate Commerce Act enabled them to avail themselves for this purpose of any competent findings of fact by the Interstate Commerce Commission, and in the present case the defendants in error relied solely upon the reports and orders of the Commission for the facts necessary to establish a *prima facie* case.

It was and is our contention that these reports and orders of the Commission did not embody the facts necessary to establish a *prima facie* case.

This contention is rested upon the proposition that nowhere in these reports or orders will be found any findings by the Commission of the facts essential to the

ascertainment of the number of cars which the defendants in error would have received had the rule of distribution been followed which the Commission by its order prescribed as the one which should have governed the plaintiff in error in making distribution of its cars.

It will not of course be denied that it was incumbent upon the defendants in error to establish what number of cars they should have received in the period covered by their claims. Several factors entered into the ascertainment and determination of this question. The capacity of the defendants in error's mine was one. This the Commission determined. The number of days on which it worked or could have worked was another. This the Commission also determined. But other and most essential facts were not established by any findings of the Commission. Thus, the Commission did not find what number of cars the plaintiff in error had available for distribution and the percentage of these which the defendants in error were entitled to, having regard to the capacity of their mine, and the capacity of the other mines which were entitled to share with them in the distribution of the available cars.

The claim of the defendants in error was that they had not received the percentage which they ought to have received of the cars which the plaintiff in error had available for distribution in the period of the action. Manifestly it would seem that it was incumbent upon them, therefore, to establish both the number which were thus available and the proportion or percentage thereof, which, having regard to the capacity of their mine, they should have received. But the Commission nowhere found what number of cars the plaintiff in error distributed in the Region in which the defendants in error's mine was located, what number of these were available for allotment and distribution among shippers generally, nor what the relation was between the capacity of the defendants in error's mine and the capacity of all the mines in the Region, all of which facts were not only important, but essential in arriving at any

determination as to the number of cars which the defendants in error should have received.

In the report of the Commission which embodies its conclusions as to the damages which should be awarded the following statement is contained:—

> "That during the first of these periods"—the Commission divided the period of the claim into two periods for its own convenience—"38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods." (Transcript of Record, page 18.)

The extract just quoted contains everything that can be found in the reports or orders of the Commission which has any bearing upon the question which was the important one, viz., what number of cars should the defendants in error have received.

The Interstate Commerce Act, while authorizing actions of the character of the present one, requires that they "shall proceed in all respects like civil suits for damages, except that on the trial of such suit the reports and orders of the Commission shall be *prima facie evidence of the facts therein stated.*"

It results from this that the plaintiff or petitioner in such an action as the present one is not relieved from the burden of proving every fact which in an action of law for damages he would be required to prove.

If the petitioners or defendants in error in the present action had elected to bring an action in the Federal Court to recover damages sustained because of the non-delivery to them of their proportion or percentage of the plaintiff in error's cars, can there by any doubt that it would have

unjustly discriminatory rates charged for the transportation of anthracite coal * * * which rates so charged have been found by this Commission to have been unjustly discriminatory," and a further amount "as reparation for unreasonable rates charged for the transportation of various shipments of anthracite coal * * * which rates so charged have been found by this Commission to have been unreasonable."

It will be observed that these orders are similar, in effect, to the order of the Commission in the present case, in that they direct the payment of a certain sum as reparation for unlawful rates charged the complainant, while in the present case the plaintiff in error was directed to pay a sum as reparation for unlawful discrimination in the distribution of its coal cars.

If, therefore, the order in the present case makes out a *prima facie* case for the defendants in error, the orders in the Meeker case should have been given the same effect, and yet this Court, impliedly, at least, refused to give such effect to the orders, for in sustaining the contention that the reports and orders together made out a *prima facie* case for Meeker it rested its conclusion or decision not upon the language of the orders, but upon what it found to be findings of fact sufficient for the purpose embodied in the Commission's reports.

And in enumerating what findings were necessary in order to establish a *prima facie* case for Meeker, it was pointed out that one of the essential findings was, "whether and in what way unjust discrimination was practiced against the shipper." Manifestly this Court did not consider that what was contained in the orders met this requirement, notwithstanding the fact that these orders set forth that the Commission had found that the plaintiff had been charged discriminatory rates. Something more, in the opinion of this Court, was necessary to the establishment of Meeker's case, and that was some finding of the Commission as to the way or manner in which the unjust discrimination had been practiced.

In the present case we have nothing in the reports

or orders of the Commission which indicate the way or manner in which the unjust discrimination complained of had been brought about. We have nothing but the conclusion of the Commission that the defendants in error had not received their fair share of cars. In other words, that they had been discriminated against in the distribution of the cars. But in the Meeker case this Court held that a mere finding that discrimination had been practiced was not sufficient, but that there must go with this, findings which would indicate in what way this unjust discrimination had been brought about.

In view of what was said by this Court in the Meeker case, it would seem to be clear that if in that case all that had appeared in or could be deduced from the Commission's reports was the statement or conclusion of the Commission that the shipper in that case had been charged discriminatory rates, the reports of the Commission would not have made out a *prima facie* case, because of the lack of findings of the facts necessary to show why the rate condemned had subjected the shipper to unjust discrimination.

In the present case, therefore, the conclusion would seem to be fully justified by the decision in the Meeker case, that as the Commission had not found how and in what manner the distribution actually made by the plaintiff in error subjected the defendants in error to unjust discrimination, its reports and orders were not sufficient to make out a *prima facie* case for the latter.

EVEN IF THE REPORTS OF THE COMMISSION ESTABLISHED A *prima facie* CASE, EVIDENCE ADDUCED BY PLAINTIFF IN ERROR ESTABLISHED THAT THE DEFENDANTS IN ERROR WERE NOT ENTITLED TO THE CARS WHICH THE COMMISSION HELD THEY SHOULD HAVE RECEIVED.

We have already had occasion to refer to the statement contained in one of the Commission's reports which embodied the conclusions of the Commission as to the number of cars which the defendants in error should

have received, but for convenience of reference we will reproduce this statement, which was as follows:—

> "That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the Complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.02 tons and 19,104.77 tons during the respective periods" (Transcript of Record, page 18).

If the defendants in error had received cars sufficient to have enabled them to ship the additional amounts of coal in the two periods which the Commission found they ought to have been enabled to ship, the aggregate of their shipments would have been in the earlier period 74,126.25 tons, and in the later period 37,078.65 tons. In these periods the aggregate rating of the defendants in error's mine, ascertained by multiplying the daily rating of 450 tons which the Commission found to be a fair rating by the number of days which the Commission found the mine would probably have worked, viz., 275 days, was 123,850 tons, and if the defendants in error had shipped in this period 74,126.25 tons, their shipments would have amounted to 59.9 per cent. of their mine's aggregate rating. And as in the later period the aggregate rating of their mine, ascertained in the manner above indicated, was 62,212.50 tons, the defendants in error would have shipped 59.6 per cent. of this rating if they had shipped the tonnage which the Commission held they should have received cars for, viz., 37,078.65 tons (Transcript of Record, page 110).

The Commission, as we have already pointed out, did not indicate how it had reached the conclusion that in the earlier period the capacity of the cars which the defendants in error should have received should have been equal to 59.9 per cent. and in the later period to 59.6 per

cent. of their mine's rating, but the manner in which these percentages were arrived at was clearly established upon the trial of the case. There were put in evidence upon the trial two exhibits which had been put in evidence by the defendants in error in the proceeding before the Commission, and upon which they relied to establish their claim of discrimination. These two exhibits will be found at pages 104 and 105 of the Transcript of Record.

The plaintiff in error had for car distribution purposes and for other operating reasons divided all of the coal territory tributary to its line into certain districts or regions. The mine of the defendants in error was located in what was known as the "Tyrone Region," and it appears from the exhibits above referred to that certain operators in this and an adjoining region, known as the "Snow Shoe Region," had received in the two periods into which the Commission divided the period covered by the claim of the defendants in error, cars equal in capacity to 59.9 per cent. and 59.6 per cent. respectively of the aggregate capacity of their mines. The percentages which these mines received, therefore, accorded exactly with the percentages which the Commission found the defendants in error should have received.

It was further established upon the trial through the testimony of one of the defendants in error, William F. Jacoby (Transcript of Record, page 106), that he and his partner had made up the figures embraced in these exhibits, and in doing so had included all classes of cars, as well those which were subject to allotment, in the distribution of which the defendants in error were entitled to share, as those which were not so subject, the latter embracing the private or individual cars of shippers, the fuel cars of other railroad companies and the fuel cars of the plaintiff in error.

In addition, it appeared that the mines embraced in these exhibits were only a small proportion of those located in the Tyrone and Snow Shoe Regions. They

comprised 20 or less out of a total of about 150, and their shipments amounted in the earlier period to about 40 per cent. of the total region shipments, and in the later period to about 32 per cent.

It is indisputable, therefore, that the Commission's finding—if such it can be called—as to the additional tonnage which the defendants in error should have been enabled to ship, was rested upon the theory or conclusion that in the two periods into which the Commission divided the period of the action the defendants in error should have received in the earlier period cars equal in capacity to 59.9 per cent. of the aggregate ratings of their mine, and in the later period to 59.6 per cent. of the aggregate ratings.

It is equally indisputable that in reaching this conclusion the Commission proceeded upon the theory that the number of cars which the defendants in error should have received was to be determined and measured by the average number which had been received by certain mines which had been picked out or selected by the defendants in error from all of those in the region in which their mine was located for the purpose of instituting or making a comparison between the car deliveries at these other and their mines, respectively, and not by the number which would have been allotted to them had the plaintiff in error made distribution of its available cars in accordance with the rule prescribed by the Commission.

And it is a further indisputable fact that the cars shown by the exhibits as placed at the selected mines embraced all cars placed thereat, whether they were individual or private cars, fuel cars of the plaintiff in error or of other railroad companies, or so called system cars of the plaintiff in error, notwithstanding the fact that under the rulings of the Interstate Commerce Commission only the last named class, that is, the systen cars of the plaintiff in error, were subject to allotment and distribution among shippers, due to the fact that the owners of the private or individual cars were entitled

to their exclusive use, while the fuel cars of the plaintiff in error and of other railroad companies had necessarily to be placed, at the mines from which the fuel supply coal was being shipped.

We submit, therefore, that because of the considerations to which we have just alluded the car deliveries shown by these exhibits to have been made at certain mines afforded no basis whatever for the ascertainment of the number of cars which the defendants in error should have received. Their rights were to be measured not by the number which some one or more other mines may have received, but by their proper share of the cars available for distribution, and not being the owners of any individual cars themselves, and not being entitled to any fuel cars, their rights were not to be ascertained or measured with reference to the deliveries of cars made at mines which were entitled to and had received individual and fuel cars.

In making up these exhibits the defendants in error had not shown separately the various classes of cars embraced in the totals shown therein, and consequently it was impossible to tell from the exhibits themselves to what extent the distribution made at any one or more of these mines had been affected by the private or fuel cars which these mines had received. Messrs. Jacoby and Weber, however, who made up these exhibits, had made up another statement which had been submitted to the Interstate Commerce Commission, which did disclose the character of the cars which had been delivered to the mines of the Berwind White Coal Mining Company, which were among those embraced in the exhibits in question, and as to the character of the cars placed at these mines Mr. Jacoby testified as follows:—

> "By MR. GOWEN:
>
> "Q. Take the Berwind White Coal Mining Company. For the first period how many cars do you show as having been deliverd at the mine of that company?
>
> "A. 13,452 cars.

"Q. Referring to another statement which I understand you also prepared and which I hand you, will you state how many of the 13,452 cars were system cars of the Pennsylvania Railroad?

"A. 460.

"Q. All the other cars which were delivered to the Berwind White Coal Mining Company were either the private or individual cars of the company or were fuel cars of the defendant?

"A. Yes, sir.

"Q. Now, coming to the second period, how many cars do you show in that exhibit as having been placed at the mines of the Berwind White Coal Mining Company?

"A. 7,154.

"Q. Referring, then, to the statement which you have just referred to, will you please say how many of those cars were system cars of the Pennsylvania Railroad?

"A. 60.

"Q. All the balance of the 7,154 cars were then either the private or individual cars of the Berwind White Coal Mining Company, or their fuel cars?

"A. Yes, sir" (Transcript of Record, page 107).

While in the exhibit which was adopted by the Commission the Berwind White Coal Mining Company is shown to have received in the earlier period cars equal in capacity to 55.5 per cent. of its mines' ratings, and in the later period cars equal in capacity to 62.3 per cent. of its mines' ratings, the testimony of Mr. Jacoby established that the allottable or distributable cars received by that Company in the earlier period did not amount to 2 per cent., and in the later period to 1 per cent. of the mines' ratings.

As we have already said, there was nothing in the evidence to indicate how many allottable cars the other mines embraced in these exhibits, other than those of the Berwind White Company had received, but in view

of the admission by the defendants in error that in making up these exhibits they had included all classes of cars, both those which were subject to allotment among shippers generally and those which were not, the distribution which is shown by these exhibits to have been made at the various mines embraced therein afforded no basis whatever for measuring the allotment which should have been made to the mine of the defendants in error.

But not only were these exhibits, because of the inclusion of unallotable cars, worthless for the purpose of measuring or ascertaining the number of cars which should have been delivered to the defendants in error, but they were also worthless for the other reason to which we have already adverted.

The measure of the plaintiff in error's duty and of the defendants in error's right was thus properly defined by the learned trial Judge:—

> "It was the duty of the defendant to apportion and deliver to the plaintiff their fair share of all the cars available during the period of the action for shippers in the district in which the plaintiffs' mine was located. If the plaintiffs received their fair and proper share of the cars so distributed in the district they have no cause for complaint against the defendant upon the ground of discrimination. The burden is upon the plaintiff to establish by satisfactory proof that they did not receive their share."

This instruction was embodied in the fifteenth point of the plaintiff in error which was affirmed by the trial Judge (Transcript of Record, page 130).

Assuming the correctness of this instruction—and its correctness, we think, cannot be successfully questioned—there must have been evidence to justify a finding by the jury that the defendants in error had not received their fair share of the cars available for shippers in the district in which their mine was located. No such evi-

dence was adduced by the defendants in error. All that was submitted to the jury was a finding of the Commission which when considered in connection with the established fact amounted to this:

We find that certain of the mines in the region in which the complainants' mine is located received in the earlier period cars equal to 59.9 per cent. of their ratings, and in the later period to 59.6 per cent. of their ratings. We therefore conclude that the complainants ought to have received the same percentages.

If the conclusion of the Commission had been thus expressed, the learned trial Judge could not have allowed the jury to base their verdict upon it because it would have been in direct conflict with the standard or measure which he had laid down to them as defining the extent of the defendants in error's rights. If, then, it be true that the trial Judge would have been obliged to instruct the jury that the Commission's conclusion or finding must be ignored if it had been so worded as to indicate on its face how it had been reached, must not the same result follow when it had been demonstrated that the objectionable standard or measure actually formed the basis for the Commission's finding?

We submit, therefore, that the plaintiff in error was entitled to an affirmance of the following point or request for charge submitted by it:—

> "4. The award of the Interstate Commerce Commission is based upon the conclusion that the plaintiffs in the year ending April 1st, 1905, should have received cars equal in capacity of 59.9 per cent. of the aggregate of their daily mine rating for 275 days, and in the period between April 1st, and October 18th, 1905, cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine rating for 138¼ days. It is apparent that this conclusion of the Commission was based upon the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines

selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located, had been equal in the earlier period to 59.9 per cent. and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines. As the number of cars placed at these mines was not the standard by which to determine the number which should have been placed at the plaintiff's mine, the basis for the Commission's award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

The learned trial Judge, however, refused to affirm the point, and he also refused two other points to the following effect:—

"8. If the jury should find that the conclusion of the Interstate Commerce Commission that the plaintiffs in the year ending April 1st, 1905, should have received cars equal in capacity to 59.9 per cent. of the aggregate of their daily mine ratings, and in the period between April 1st, and October 18th, 1905, cars equal in capacity to 59.6 per cent. of the aggregate of their daily mine ratings, was reached or arrived at because of the evidence presented by the plaintiffs that the aggregate of the cars placed by the defendant at certain mines selected for the purpose of comparison from those comprised in the region in which the plaintiffs' mine was located had been equal in the earlier period to 59.9 per cent., and in the later period to 59.6 per cent. of the aggregate ratings of these selected mines, the basis for the Commission's conclusion and award was an erroneous one, and the plaintiffs consequently are not entitled to recover."

"9. If the jury find that if the defendant had made distribution of its cars in accordance with the method prescribed as proper by the Interstate Commerce Commission, the plaintiffs would not have received in the period ending April 1st,

1905, cars equal in capacity to 59.9 per cent. of the rating of their mine, and in the period between April 1st, 1905, and October 18th, 1905, cars equal in capacity to 59.6 per cent. of the rating of their mine, and that the award of the Commission was based upon the theory or conclusion that cars equal in capacity to these percentages, respectively, should have been received by the plaintiffs, the award was invalid, and the plaintiffs consequently are not entitled to recover."

The plaintiff in error was entitled, we submit, to an affirmance of all of these points.

The learned counsel for the defendants in error in the brief presented to one of the Courts below, attempted to sustain the right of the Commission to adopt as the measure of the defendants in error's rights the percentages of 59.9 per cent. and 59.6 per cent. of their mine's capacity, upon the following grounds:—

"However, if the Commission had fixed the plaintiffs' damages at the difference between their actual car supply and a car supply on a basis of 59.9 per cent. of their mine's rated capacity for the first period covered by their complaint, and of 59.6 per cent. for the second period, such standard would have been a proper standard by which to estimate plaintiffs' damages.

"The evidence before the Court in this case (pages 64, 65), shows that, during the periods covered by this suit, certain named mines in the Tyrone Division, operating under similar circumstances and conditions with plaintiff's mine, were being furnished cars to ship 59.9 per cent. of their rated output in the first period, and 59.6 per cent. of their rated output in the second period; and the effect of the above suggested standard being adopted by the Commission would merely be to place Falcon No. 2 mine on an equality with these favored mines in the Division.

> "Section 3 of the Act to Regulate Commerce provides that: 'It shall be unlawful for any common carrier subject to the provisions of this Act to make or give any undue or unreasonable preference or advantage to any particular person, company, firm, corporation, or locality, or any particular description of traffic in any respect, whatsoever, or to subject any particular person, company, firm, corporation, or locality, or any particular description of traffic, to any undue or unreasonable prejudice or disadvantage in any respect whatsoever.'
>
> "The Act was intended to produce equality among shippers and this can only be secured by giving to every shipper the same advantages given to the most favored shipper or its equivalent in damages."

Manifestly this position is an unsound one. If the mines receiving the percentages of cars referred to in this extract from counsel's brief were unduly favored, it does not follow that the defendants in error were legally injured because they did not receive a like preference. They were injured, if at all, only to the extent to which the overdelivery to these other mines resulted in a reduction of the number of cars which the defendants in error otherwise would have received. This is clearly the law, and was recognized as such by the learned trial Judge.

> "The law provides," said Judge Thompson in his charge to the jury, "that a shipper shall recover the full amount of damages which he sustains, and in arriving at the amount of damages which these plaintiffs sustained you can only take into consideration whether they have been discriminated against and to what extent they were damaged by that discrimination. If one company got half of the cars which were distributable for that system when it was only entitled to one-quarter, then the amount that the other mine owners would be damaged would be the amount to which their share would be diminished

> by giving that larger allotment to somebody else. In other words, if the Berwind White Company got 59 per cent. of its output when the average allottable was 28 per cent., it does not necessarily follow that the complainants would have been damaged the entire difference between 28 per cent. and 59 per cent. They would be damaged the amount to which their number of cars would be reduced in the general allotment by favoring somebody else and taking the cars from them." (Transcript of Record 129).

Under this view of the law—and we submit it is unquestionably the correct one—it is not possible to sustain the Commission's finding or conclusion that the defendants in error should have received cars equal to 59.9 per cent. and 59.6 per cent. of their mine's capacity.

This would have been true even if the only evidence in the case tending to establish what the car distribution made by the plaintiff in error had been in the period of the action had been the exhibits which we have been considering.

But upon the trial the plaintiff in error put in evidence exhibits which will be found at pages 122 and 123 of the Transcript of Record, which show the total rating in cars of all mines embraced in the region in which the defendants in error's mine was located and the total number of cars placed in this region in the two periods into which the Commission divided the period of the action, and following these exhibits on page 123 of the Transcript of Record will be found the testimony of Edmund C. Haley, as to the percentage of cars placed in this region in these two periods. The percentage in the earlier period was 30.3 per cent., and in the later period 29.9 per cent. The cars embraced in these exhibits included cars of all classes, as well those which were not subject to allotment—the individual and fuel cars—as those which were subject to allotment among shippers generally.

It was admitted that the defendants in error had no private or individual cars, and were not entitled to receive any fuel cars, as they were not shipping any railroad supply coal, and it is consequently apparent that if they had received cars equal in the earlier period to 30.3 per cent. of their rating, and in the later period to 29.9 per cent. of their rating, they would have received all and more than they could possibly have been entitled to.

As appears from the exhibits already referred to, which will be found at pages 104 and 105 of the Transcript of Record, the defendants in error in the earlier period received cars equal to 28 per cent. of their mine's rating, and in the later period to 23.9 per cent. of their mine's rating. In the earlier period, therefore, their percentage was 2.3 per cent less than the region percentage, and in the later period 6 per cent. less.

In view of the fact that the region distribution included large numbers of cars in the allotment and distribution of which the defendants in error were not entitled to participate, it is impossible to affirm that the lower percentages of the defendants in error indicated that they had not received their proper share of the cars distributed in the region. As a matter of fact, it is a necessary conclusion from the testimony that the defendants in error were not entitled to the region percentage, due to the fact that more than one-half of the cars distributed in the region were made up of individual or private cars and fuel cars. This appears from the exhibit which will be found at page 121 of the Transcript of Record.

But even if we were to treat the region percentages as controlling and as measuring the defendants in error's rights, the recovery which they have secured in the present action would not be thereby justified because this, as we have shown, has been based upon the theory that instead of receiving in the earlier period the region percentage of 30.3 per cent., they ought to have received 59.9 per cent., and instead of receiving in the later

period the region percentage of 29.9 per cent., they should have received 59.6 per cent. of their mine ratings.

In view of the Region distribution, the conclusion is irresistible that the larger percentages received by the selected mines embraced in the exhibits prepared by the defendants in error were due either to the large number of individual and fuel cars delivered to them or to an unduly preferential allotment to them.

It is immaterial, so far as the present case is concerned, to which of these causes the larger percentages were due, for if the individual and fuel cars were responsible therefor, these percentages afforded no measure for the ascertainment of the percentage which should have been received by the defendants in error, who had no individual or fuel cars, and if preferential allotment was the explanation of these larger percentages, then clearly the defendants in error could not properly claim that they were damaged because they were not also preferred.

In Pennsylvania Railroad Company *vs.* Puritan Coal Mining Company, decided by this Court April 5th, 1915, the shipper sought to have the cars to which it was entitled ascertained with reference to the number received by another shipper who, it was claimed, had been unduly preferred. This claim was thus overruled by the trial Judge:—

> "The contention of the plaintiff is that it was entitled to as large a percentage of cars as any other shipper situated substantially the same as the plaintiff and under substantially the same conditions.
>
> "Ruling: This exception is overruled. It refers to and covers one of the principal contentions in the case as to the measure of damages. The contention of the plaintiff that it is entitled to as large a percentage of cars as any other shipper situated substantially the same as the plaintiff and under substantially the same conditions leads to such an excess of damages that we believe that that fact alone proves the falsity of the theory. The law gives the injured

> party the right to recover damages measured by what will compensate him for his injury. All, therefore, it seems to us that the plaintiff is entitled to is that which will compensate him for what he did not get of that to which he was entitled. Giving cars proportionate to what the favored shipper got would be to make him also a preferred and favored shipper in damages although not in cars. This surely is not contemplated by the legislation governing discriminatory acts."

In Hillsdale Coal and Coke Company *vs.* Pennsylvania Railroad Company, 19 I. C. C. 356, the Interstate Commerce Commission recognized that the number of cars received by an alleged favored shipper did not fix the *pro rata* or share which other shippers should have received. In its report in that case the Commission said:—

> "The Act to regulate Commerce as amended not only gives a shipper a right to an equal or a justly ratable use of the facilities of an interstate carrier, but gives him the assurance also that no else shall fare ratably better than he does at the hands of the carrier. It may be true that a Court would not allow the Complainant damages for losses due to the defendant's failure to furnish the cars that it was not entitled to receive, but this Commission may surely require an interstate carrier to cease and desist from giving its competitor more cars than the competitor is entitled to receive."

In the present instance, however, the Commission has clearly made an award to the defendants in error because of the plaintiff in error's failure to furnish cars that the defendants in error were not entitled to receive, and in so doing has, we submit, been guilty of a clear mistake in law.

The theory upon which the Commission has acted in the present case is also at variance with the de-

cision of this Court in the case of Pennsylvania Railroad Company *vs.* International Coal Mining Company, 230 U. S. 184. In that case this Court in effect determined that the damages of a shipper who had been charged discriminatory rates were not to be measured by the amount of the preference extended to another shipper, but by the amount of the damage which the complaining shipper had sustained as the result of the preferential rates accorded to his competitor.

NUMBER OF CARS TO WHICH THE DEFENDANTS IN ERROR WERE ENTITLED SHOULD HAVE BEEN ASCERTAINED WITH REFERENCE TO THE RULE OF DISTRIBUTION IN FORCE DURING THE PERIOD OF THE ACTION, AND NOT WITH REFERENCE TO A RULE SUBSEQUENTLT PROMULGATED BY THE INTERSTATE COMMERCE COMMISSION.

In another respect the method adopted by the Commission for ascertaining the number of cars which the defendants in error should have received was legally objectionable.

The number was ascertained not with reference to and in accordance with the rule of distribution in force during the period of the action, but ostensibly, at least, with reference to and in accordance with another and different rule promulgated by the Commission some years after the close of the period of the action, although, as we trust we have demonstrated, even this rule was not properly used or applied by the Commission.

The objection that the Commission could not lawfully give a retroactive effect to its rule was not made or urged in the Court below. But that it could not do so would seem to be the necessary result of the decision of this Court in the case of the Pennsylvania Railroad Company *vs.* Puritan Coal Mining Company, decided April 5th, 1915.

In that case it was held by this Court that the present plaintiff in error was responsible to shippers for non-compliance with the method or system of distribution

prescribed by its rule in force during the period of that action, and that, as the rule in question did not contemplate that individual cars should be counted, the shipper in that case was entitled to have the number of cars which it should have received determined without reference to the number of individual cars which had been delivered to it.

In the proceeding which eventuated in the award for the recovery of which the present action was brought, the Interstate Commerce Commission has held that any rule which did not require that private cars should be counted was unlawful because violative of Section 3 of the Interstate Commerce Act, and that in determining the number of cars which a shipper ought to have received, the private cars received by shippers must be counted.

The order of the Commission embodying this finding or determination will be found at pages 36 and 37 of the Transcript of Record.

The fact was not unknown to this Court when it rendered its judgment in the Puritan case that the Commission had condemned the rule which the shipper in that case was permitted to secure the benefit of, for in the opinion of the Court reference is made to the variance between the carrier's and the Commission's rules, and it was stated in the opinion that it was not necessary to determine in that case whether the Commission's rule could be given a retrospective effect.

There was no doubt that the Commission had itself given to its rule a retrospective effect, and if in so doing the Commission was acting within the limits of its powers, the conclusion would seem to be inevitable that the shipper in that case, the Puritan Company, was as much subject to the Commission's rule as was the plaintiff in error. Indeed, the main and avowed purpose of the rule announced by the Commission was to prevent shippers who were owners of private cars from securing the advantage of an allotment of the carrier's cars which took no account of their own cars which had been delivered to them. If, therefore, the Commission's rule could properly

be regarded as affecting the Puritan Company and other shippers in the period antedating its promulgation, this Court, it is submitted, would not have permitted that Company to secure damages for the non-delivery of cars, the receipt of which would have secured to the Puritan Company an unlawful preference.

This Court has determined that a carrier's rule of car distribution is binding upon shippers and Courts until a different rule has been established by the Interstate Commerce Commission in the exercise of its administrative powers.

Would it not be entirely compatible with the purpose of the Interstate Commerce Act to treat the carrier's rule as controlling and determining the rights of shippers so long as it remains in effect or at least until its validity or propriety is challenged by a proceeding before the Interstate Commerce Commission?

If we are to adopt the view taken by the Supreme Court of Pennsylvania in the Puritan Coal Mining Company case, 237 Penna. State Repts., 420, a rule of distribution promulgated by the Commission is only effective and controlling from the date of the Commission's order. That Court in disposing of the contention that the State Court had not jurisdiction of the action pending before it, held, in effect, that orders of the Interstate Commerce Commission regulating car distribution could have no retroactive effect.

Speaking of the effect of the establishment by the carrier of a rule of distribution, the Supreme Court of Pennsylvania in that case said:—

> "Had the plaintiff been dissatisfied with the regulation it could have appealed to the Commission to correct it; had its appeal been sustained and followed by an order of amendment or correction of the regulation, then, *upon subsequent disregard of the regulation as amended, plaintiff's only forum for relief would have been the Federal Court since in that case again Congress would have taken possession of the field.*"

The Court admitted in that case that from the date when Federal control was effectively exercised by the action of the Interstate Commerce Commission, State control ceased, but in the Court's opinion the Commission's action was only effective on and after the date of its orders.

We are not concerned here with the power, generally speaking, of the Interstate Commerce Commission, to give a retroactive effect to any conclusion or decision which it may reach, but the question is whether justice to a carrier does not require that the Commission shall refrain from giving such effect to an order regulating or modifying a carrier's system of car distribution, especially when the carrier's rule is not transgressive of the requirements or obligations of the Interstate Commerce Act as theretofore interpreted and defined by the Commission, and is not at variance with the practice of other carriers.

Where the Commission finds that a carrier has been charging an unreasonable or a discriminatory rate, no injustice is done to the carrier by requiring it to refund the amounts which it has received which the Commission finds it was not properly entitled to demand or collect. But the case is different when a carrier's system of distribution is condemned or found to be unlawful and improper by the Commission. The carrier has derived no benefit from the enforcement of the rule which it has established, and indeed, generally speaking, had but little, if any, interest in the character of the rule which should control it in the distribution of its equipment. When it promulgates its rules, therefore, and lives up to these and its shippers acquiesce therein, or at least take no proceedings to have the validity of these rules tested by the only tribunal which is competent to pass upon the subject, is it unreasonable to hold these shippers bound by their acquiescence in the rules thus established? One need not go outside of the present case in order to see what a hardship is imposed upon the carrier by a construction of the Interstate Commerce Act which would

permit the Commission at the instance of shippers to declare unlawful rules of car distribution which with their acquiescence have controlled the carrier for years preceding the Commission's action.

In the present case the defendants in error instituted no proceedings before the Commission questioning or challenging the rule of distribution which had been established by the plaintiff in error until June, 1907.

The Commission made no order in this proceeding condemning the rule of the plaintiff in error until March, 1910, and it then proceeded to make its condemnation of the plaintiff in error's rule operative as far back as the year 1904.

If every shipper had taken advantage of the opportunity afforded by this action of the Commission, the plaintiff in error would have been called upon to pay damages running into many hundreds of thousands of dollars, and this because, in the judgment of the Commission, the rule established by the plaintiff in error was not as well calculated to secure equality of treatment among shippers as that devised by the Commission. And yet the rule condemned by the Commission was designated by this Court in the Puritan case as a reasonable rule, and even if it was not calculated to produce the fairest allotment and distribution of a carrier's equipment, it would be unfair that the carrier should be penalized for its mistake in this respect, in view of what both the Commission and this Court have said in respect to the uncertainty existing among the carriers of the country as to the rule of distribution which would best accomplish the purposes sought to be secured by the Interstate Commerce Act.

In the Morrisdale Coal Company case, 230 U. S. 304, Mr. Justice Lamar, delivering the opinion of this Court, speaking of this uncertainty, said:—

> "But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which

this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. As late as 1910, it was said (19 I. C. C. 387), that the question was in a state of flux, and an examination of the decisions in the numerous cases brought about that time will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads, consigned to particular mines, should be counted in making the distribution. Others held that such cars should be counted, but that if the foreign cars, or those owned by the private corporations, exceeded their percentages, the excess might be retained by those coal companies. This view was adopted by the Commission, which also held that fuel cars belonging to the carrier should be counted except where the railroad purchased the entire output of the mine."

If the present judgment should be permitted to stand, this anomalous situation would be presented: That one shipper, the Puritan Coal Co., by electing to hold the carrier to its rule of distribution, has got the benefit of a system of distribution favorable to itself, while another shipper has, by challenging the rule and securing its condemnation by the Interstate Commerce Commission, got the benefit of another and irreconcilable system of distribution favorable to it.

Clearly it would seem that this result is inadmissible, whether considered from the standpoint of the carrier or the shipper, for if there is one thing that is essential in order that the obligations of the Interstate Commerce Act may be complied with, it is that there should be but one uniform system of distribution by a carrier of its equipment among all its shippers.

The decision of this Court in the case of the Pennsylvania Railroad Company *vs.* Clark Brothers Coal Mining Company (decided June 21st, 1915,) is not op-

posed to the view of the Commission's power to which we have just been referring. All that this Court decided in that case was that, when a shipper invoked the jurisdiction of the Commission in order to secure a finding as to the legality of a carrier's rule of car distribution, it thereby established the character of its claim for damages resulting from the enforcement of an unjust rule so far as its interstate transactions were concerned, and, consequently, such a claim could be prosecuted solely under and in accordance with the provisions of the Interstate Commerce Act. It was not necessary for this Court in that case to determine what was the extent of the relief which the Commission was empowered to grant, and no opinion was expressed by the Court on this point.

Reports and Orders of the Commission as a Whole Wrongly Admitted in Evidence.

All the reports and orders of the Interstate Commerce Commission were admitted *in solido* over the objections of the plaintiff in error.

The objection to the admission of the reports and orders will be found at page 59 of the Transcript of Record, and was in the following form:—

> "Mr. Gowen:
>
> "We object to the admission of the report and the order in evidence because it is but a part of the Record in the case and is not, therefore, admissible as the Record before the Commission; and also because it embodies conclusions of law, arguments and other matters extraneous from and entirely disassociated from findings of fact, and by the Interstate Commerce Act findings of fact of the Commission are alone made *prima facie* evidence."

The objection to the admission of the supplemental report of the Commission will be found at page 67 of

the Transcript of Record, and the objection to the admission in evidence of the order of the Commission at page 69 of the Transcript of Record.

All these objections were overruled and the reports and orders as a whole were admitted.

A perusal of the reports thus put in evidence will show how hurtful their admission must have been to the plaintiff in error. Thus, at page 64 of the Transcript of Record will be found the Commission's comments which were read to the jury upon certain special orders in force during the years 1902, 1903 and 1904, providing for the special allotment of 500 cars daily to the Berwind White Coal Mining Company. With reference to these orders the Commission say:—

> "That Company had contracts for supplying coal for certain steamships sailing from New York Harbor. Complaint had been made that these steamers were frequently delayed because of lack of coal, and the defendant felt that it was warranted in making that special arrangement with the coal mines that had undertaken to supply them with fuel. This preference was the occasion of comment by the Commission in its report in the Coal and Oil Investigation. *Few, if any, of these specially assigned cars reached the Berwind White mines in this particular district, and therefore it is difficult to determine to just what extent these complainants were prejudiced by that preference of a competing company's operations in another district; nevertheless, it was inequitable in principle and undoubtedly so to some extent, at least, in its results, and we see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference to one company and district, and an undue discrimination against coal operations in another district.*"

This special allotment of cars, as the report of the Commission indicates, affected the defendants in error, if

it affected them at all, only because it resulted in diminishing the number of cars available for distribution in the district in which the defendants in error's mine was located, but the Commission, when it came to determine the damages, did not find that the defendants in error had sustained any damage whatever due to the consideration that the cars distributed in the district in which their mine was located were less than ought to have been available for distribution.

And when it is considered that in the entire period of the action the deliveries of cars to the Berwind White Coal Mining Company included but 520 of the plaintiff in error's cars, other than its fuel cars, the irrelevancy of the reference to the so-called 500-car order is only the more strongly accentuated.

Again, the Commission in its report said:—

> "Another point also mentioned in our report in the Coal and Oil Investigation just referred to is that 1000 of the defendant's own system coal cars were sold by the defendant to and were thus made available by the Berwind White Company. The defendant to that extent diminished its capacity to supply the coal car requirements of other coal operations upon its lines. While the right, as a legal proposition, of an interstate carrier to sell its equipment has not been discussed before us in these cases, and therefore will not be considered in this report, the least that can be said of that transaction is that it indicates a desire on the part of the defendant at that time to forward the interests of a particular company at the expense of its competitors" (Transcript of Record, page 64).

Here again was an adverse comment by the Commission upon a transaction of the plaintiff in error, the validity of which the Commission said it would not consider, but which nevertheless it commented adversely upon.

Still again the Commission says:—

> "It is established with reasonable clearness on the Record that the Berwind White mines during the years 1906 and 1907, as well as to a period immediately preceding those dates, were daily in receipt of coal cars in large numbers, and were therefore kept in operation almost continuously, while the Complainants received an inadequate supply, and were not able, therefore, to run their mines to the best advantage. This difference is largely explained by the fact that the Berwind White Coal Mining Company owned a large number of private cars and also enjoyed contracts for supplying the defendant and its connections with coal."

Unquestionably this statement was an adverse comment by the Commission upon the relative supply of cars to the Berwind White mines and those of the defendants in error. It is true that the Commission somewhat minimized the effect of what it said by the reference to the large number of private cars and fuel cars which the Berwind White Company received, but in view of the fact that throughout the entire period covered by the defendants in error's claim the plaintiff in error had delivered but 520 cars in the allotment of which the defendants in error had any interest, the comments of the Commission upon the relative supply available to the two operations were wholly unjust.

A defendant who is required to overcome a *prima facia* case established by findings of fact of the Commission has a difficult enough burden to discharge. And this should not be added to by thrusting into the jury box comments or animadversions of the Commission upon the conduct or transactions of the defendant and especially is this true where as in the present case what was thus made the subject of comment or animadversion was not even treated or regarded by

the Commission as a contributing cause of the injuries for which the award was made.

AWARD INVALID BECAUSE OF FAILURE OF COMMISSION TO FIND THAT THE AMOUNT THEREOF WAS PROPERLY PAYABLE TO DEFENDANTS IN ERROR.

The power of the Interstate Commerce Commission to award damages is conferred by Section 16 of the Interstate Commerce Act, and that power is thus defined:—

> "That if, after hearing on complaint made as provided in Section 13 of this Act, the Commission shall determine that any party complainant is entitled to an award of damages under the provisions of this Act for a violation thereof, the Commission shall make an order directing the carrier to pay to the complainant *the sum to which he is entitled* on or before a day named."

The power, then, is to award the sum which the Commission finds the complainant is entitled to, and it would seem necessarily to follow that the Commission is without power to award any sum which it has not found that the complainant is entitled to.

As to the obligation devolved upon the Commission to find that a sum is due before an award thereof can be made in favor of a complainant, the Commission itself has said in a proceeding in which the question involved was whether the voluntary or enforced reduction of a rate by a carrier justified an award of damages in favor of a shipper who had paid the higher rate to the reduction:—

> "The reference to particular circumstances and conditions in the classes of cases just mentioned is not an intimation that awards of reparation are to be confined to such cases. It is intended only to make clearer our view that whatever may be the nature of the facts, circumstances and conditions

> appearing in a particular case where reparation is involved, whether on account of excessive rates or by reason of unjust discrimination, *there must be that degree of certainty and satisfactory conviction in the mind and judgment of the Commission as would be deemed necessary under the well established principles of law as a basis for a judgment in Court.*"
>
> Anadarko Cotton Oil Company *vs.* Atchison, Topeka & Santa Fe Railway Company, 20 I. C. C. Rep. 43, 51.

The report of the Commission in the present case contains this statement:—

> "We further find that the complainants in the sale of their mine realized a profit of $7500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded" (Transcript of Record, page 19).

It is undeniable, therefore, that the Commission in the proceeding before it made an award in favor of the defendants in error, and at the same time distinctly declined to determine whether the defendants in error were entitled to the amount thereof or only to such amount less some deduction. We submit that the award, therefore, lacked the basis which was essential in order to make it valid, viz., that the Commission should have determined that the defendants in error were entitled to the amount thereof.

In this connection it is quite immaterial, it would seem, whether the sum of $7500 referred to by the Commission or any part of the purchase price of their mine should or should not have been taken into account in determining the amount of the reparation to which the defendants in error were entitled. It was a prerequisite

to any valid award of the Commission that it should determine whether the amount thereof was properly payable by the plaintiff in error, and this determination, as we have shown, was lacking in the present case.

There was a very substantial basis for the contention that some of the purchase price should be taken into consideration in determining the damages sustained by the defendants in error. In determining these damages the Commission ascertained the amount of coal which would have been shipped in the additional cars had these been available, and the profit that the defendants in error would have realized thereon, and the damages were determined with reference to this profit. Of course the coal which had not been shipped was not lost to the defendants in error, but remained in the ground available for future disposition, and it was actually afterwards disposed of when the defendants in error sold this unmined coal in conjunction with their mine.

The Commission's conclusion was that the defendants in error ought to have been enabled to ship 54,516 tons in addition to the tons which were actually shipped in the period covered by the claim. The fact that this amount of coal still remained unmined and available to the purchaser undoubtedly materially enhanced the price which the defendants in error were able to secure for their mine and coal estate when it subsequently disposed of the same.

"The record shows," says the Commission, "a purchase price of $25,000 and that W. F. Jacoby & Co. retained the mine until October, 1905, when they sold it for $32,500, or for $7500 more than they paid for it. In the meantime they had mined 55,000 tons of coal and sold it apparently at a profit of about 20 cents a ton. Whether the mine could have been sold so well if more coal had been taken out of it by the complainant is a question as to which it is difficult to arrive at a satisfactory conclusion." And there the Commission left it.

Unquestionably the value of the mine at the time of its sale by Jacoby & Co. was largely governed by the coal

then available for mining, and consequently the defendant in error realized something through the enhanced value of the mine, for the 54,000 tons which were not mined due to the lack of cars in the period of the action.

The Commission was required, we submit, to determine what was thus afterwards realized for the 54,000 tons and to correspondingly reduce the damages. But in any event it was required to pass upon and determine the question whether the profit subsequently realized from the sale of the 54,000 tons should or should not be taken cognizance of.

F. D. McKENNEY,
FRANCIS I. GOWEN,
JOHN G. JOHNSON.
For Plaintiff in Error.

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No. ~~1397~~ 22 October ~~Term, 1915.~~

IN THE

SUPREME COURT OF THE UNITED STATES

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, co-partners, trading under the firm name of W. F. JACOBY & COMPANY,
Defendants-in-Error.

On Certificate from and Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit.

Brief for Defendants-in-Error.

WM. A. GLASGOW, JR.,
Counsel for Defendants-in-Error.

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IN THE

Supreme Court of the United States.

October Term, 1915. No. 139.

PENNSYLVANIA RAILROAD COMPANY,
Plaintiff-in-Error,

vs.

W. F. JACOBY and ISAAC C. WEBER, Co-partners, Trading under the firm name of W. F. JACOBY & COMPANY,
Defendants-in-Error.

ON CERTIFICATE FROM AND WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF FOR DEFENDANTS-IN-ERROR.

The defendants-in-error, W. F. Jacoby and Isaac C. Weber, co-partners, trading in the coal business, under the firm name of W. F. Jacoby & Company (plaintiffs below, hereinafter called plaintiffs), were, from April 1, 1904, to October 18, 1905, engaged in operating a coal mine, known as Falcon No. 2, on a tract

of bituminous coal land, situated in Bigler Township, Clearfield County, Pennsylvania (Commission's Report, Record, p. 31).

The mine was fully equipped for operation, and on April 1, 1904, was provided with an underground electric system for hauling mine cars, had a first class wooden tipple and patent dump, an ample supply of mine cars and track facilities, and the grades favored the outward movement of loaded mine cars, and the mine was regarded as one of the best equipped mines in the District (Commission's Report, Record, p. 31).

The coal in the Falcon No. 2 mine was accepted as a very superior grade of steam coal, and was readily marketable, and was shipped to other States than Pennsylvania, in interstate commerce. In 1904 there were about 100 acres of coal remaining in sight, in the tract, (Commission's Report, Record, p. 32). The rated capacity of the mine, made by the Pennsylvania Railroad Company (defendant below, hereinafter called defendant), during the period from April 1st, 1904, to October 18th, 1905, as the basis of proportional car distribution, was 450 tons a day (Record, p. 18), and the actual average output capacity of the mine was 600 tons a day (Record, pp. 19, 33). During the period from April 1st, 1904, to October 18th, 1905, the Pennsylvania Railroad Company was a common carrier and engaged in the transportation of coal in interstate commerce, and for the purpose of making a pro rata distribution of cars to mines in the coal fields, it divided its coal territory into Coal Districts served by the Divisions of its Railroad (Record, p. 94), in one of which Coal Districts, known as the Clearfield District, served by the Tyrone Division, the Falcon No. 2 mine was situate. On the same Division and in the same Coal District, there were a number of other mines, belonging to

the Berwind-White Coal Mining Company, the Lehigh Valley Coal Company and other mine operators, competing with Jacoby & Company. The mines of the Lehigh Valley Coal Company were on a different branch of the Pennsylvania Railroad, known as the Snowshoe Branch, but were in the same Coal District and on the same Tyrone Division; paid the same rates, and were carried on the same car distribution sheet as Falcon No. 2 (Record, pp. 95, 97, 99, 106). During the period from April 1st, 1904, to October 18th, 1905, the Falcon No. 2 mine, though in operation and demanding cars continually, received far less car service than its rated capacity entitled it to, and also far less car supply than was given by the Pennsylvania Railroad Company during the same period to other mines in the same Coal District and on the same Division above mentioned, of a similar or lower rated capacity and with similar or inferior facilities for mining and loading coal, and was prevented from mining and shipping coal which it was entitled to ship to fill its contracts, and from accepting other available and profitable contracts, and from obtaining and fulfilling other contracts which it could have obtained and fulfilled.

In consequence, the Falcon No. 2 mine was greatly hampered; its employes were forced to leave and seek other employment, and its cost of operation per ton materially increased. Jacoby & Company's business also suffered by reason of inability, due to car shortage, to accept or promptly fulfill contracts at Falcon No. 2 mine, and in October, 1905, they were obliged to go out of business and sell the mine.

In June, 1907, the plaintiffs (defendants-in-error here) filed a complaint with the Interstate Commerce Commission, averring that the Pennsylvania Railroad Company, the defendant (plaintiff-in-error here), had

been guilty of unjust and unlawful discrimination against plaintiffs and in favor of other coal operators in the Clearfield District and on the Tyrone Division, in the distribution of coal cars, during the period from April 1, 1904, to October 18, 1905, and had also been guilty of other unjust and unlawful discriminatory practices against plaintiffs in distributing coal cars among its several Divisions, to the prejudice of the Tyrone Division and to the plaintiffs, as coal operators and shippers on such Division.

The complaint was duly investigated and heard by the Commission, and on March 7, 1910, the Commission filed a report (Record, p. 31), finding that the defendant had been guilty of unjust and unlawful discrimination, in violation of the Act to Regulate Commerce, in both the respects charged.

On page 64, the Commission found:

> "But Falcon No. 2 was not placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal car equipment during the period of this action." (Record, p. 64.)

And in referring to the "special allotment of 500 cars daily" to the Berwind-White Coal Mining Company, which took that number of cars out of the equipment for pro rata distribution to the Tyrone Division, the Commission finds (Record, p. 64):

> "We see no grounds upon which it can be justified by the Commission. On the contrary, it must be condemned in strong terms as an undue preference of one company and district and an undue discrimination against coal operations in another district."

And the Commission further found (Record, p. 65):

> "For the reasons explained at some length in

that case" (Hillsdale Coal & Coke Co. vs. P. R. R. Co.), "those rules" (referring to the rules complained of by Jacoby & Company) "operated as an undue discrimination against these complainants, and we so find. But for the present and for the reasons there explained we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby."

And on the same day, to wit, March 7, 1910, the Commission issued an order (Record, p. 36), in which the nature of the practices complained of on the Tyrone Division were set forth, and it was

> "*Ordered*, that the said rule, regulation and practice of the defendant in that behalf unduly discriminates against the complainants and other coal operators similarly situated, and is in violation of the third section of the Act to Regulate Commerce." (Record, pp. 37, 66.)

The order then requires the defendant to cease and desist "from any practice and to abstain from maintaining any rule or regulation that does not require it to count all such assigned cars against the regular rated capacity of the particular mine or mines receiving such cars in the same manner and to the same extent and on the same basis as unassigned cars are counted against the rated capacity of the mines receiving them."

The question of "damages claimed by the complainants" was deferred by the order, "pending further argument in the premises."

Subsequently, on March 11, 1912, the Commission filed a Supplemental Report (Record, p. 14), which

contained the further findings of the Commission as to the complaint of Jacoby & Company (Record, p. 18). In this Supplemental Report the Commission found:

1. "We find that by reason of the discriminations ascertained and set forth in our report in Jacoby vs. P. R. R. Co., 19 I. C. C. 392, the complainants *were damaged to the extent of* $21,094.39, *which they are entitled to recover with interest from June* 28, 1907."

2. "(a) That the fair rating of the mine for the time in question, as fixed by the defendant and not objected to by the complainants, was 450 tons per day."

3. "(b) That during the period from April, 1904, to March 31, 1905, the mine was operated 275 days, and that during the second period named on the exhibits, from April 1 to October 18, 1905, it was operated 138¼ days."

4. "(c) That during the first of these periods 38,714.23 tons were actually shipped from Falcon No. 2, and during the second period 17,973.88 tons; that if the complainants had received their fair share of the cars available for distribution the mine would have made additional interstate shipments and sales to the extent of 35,412.92 tons and 19,104.77 tons during the respective periods.

5. "(d) That the average selling price of the complainant's product for the first period was $1.212 per ton, and in the second period $1.1670; that the cost of production, based on economical operation of the mine, with a fair car supply, would have been 92 cents during the entire period of the action; and that the profit during the first period would therefore have been 29.2 cents and during the second period 24.7 cents per

ton. This measures *the loss on the tonnage which the complainant was unable to ship.*"

6. "(e) That the actual cost of production is shown by the record as $1.016 per ton during the first period and $1.049 per ton during the second period, making an excess of 9.6 cents and 12.9 cents for the respective periods in the actual cost of production under the conditions obtaining, as compared with what would have been the cost based *on a fair car supply,* as heretofore stated. This is the *basis* adopted for computing *the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question.*" (Italics ours.)

The Commission then finds that the complainants sold their mine and realized a profit of $7,500 over the purchase price which they had paid, but the Commission does not undertake to say that this amount or any part of it should be deducted from the amount of reparation awarded.

On the same day, to wit, March 11, 1912 (Record, p. 26), the Commission entered its order, making its original report and supplemental report a part thereof, in which it "authorized and directed" the defendant, Pennsylvania Railroad Company, "to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 28, 1907, *as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission.*

The time within which the Commision ordered the defendant to pay to the plaintiffs the amount which

they were found to have been damaged having expired, the plaintiffs availed themselves of the statutory proceedings provided by Section 16 of the Act to Regulate Commerce, and filed a petition in the District Court of the United States for the Eastern District of Pennsylvania, "setting forth briefly the causes for which he claims damages and the order of the Commission in the premises", and praying the Court to enter a judgment in their favor against the defendant for the amount which plaintiffs had been damaged, as set forth in the reports and orders of the Commission which were filed with the petition as a part thereof.

This was the "petition" which by Section 16 of the Act is spoken of as "a petition *for the enforcement of an order for the payment of money*", and which is required to "be filed in the Circuit Court or State Court within one year from the date of the order, and not after."

A demurrer was filed by the defendant to the petition on September 18, 1912, and on the 12th of November, 1912, the Court handed down an opinion, overruling the demurrer; the defendant pleaded "not guilty", and on the 3d of March, 1913, the cause was tried by a jury. On the trial of the cause the plaintiffs, Jacoby & Company.

I. Offered in evidence the original report of the Interstate Commerce Commission, finding that the defendant had been guilty of unjust discrimination against the plaintiffs, and read to the jury only the pertinent part of said report (Record, pp. 61 to 65, inclusive.) *While objection was made by defendant* to the offer of the report as a whole, which was overruled, no objection was made to the reading to the jury of the pertinent parts of the report. This report was offered for the purpose of showing that *the Commis-*

sion had found that the rules of car distribution which were put into effect and maintained by the defendant during the period covered by the complaint, unjustly discriminated against the plaintiffs, in violation of Section 3 of the Act, and only the pertinent parts were, without objection, read to the jury.

2. Offered in evidence the supplemental report of the Commission as to discrimination, and the fact and amount of damage suffered by the plaintiffs. (See Record, pp. 67-68.)

3. Offered in evidence the order of the Commission requiring the defendant to pay to the plaintiffs the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 20, 1907, "as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports."

The plaintiffs then showed that no part of the award of the Commission had been paid, and that the report and supplemental report of the Commission and its two orders were duly served upon the Pennsylvania Railroad Company.

The defendant then offered evidence, in an effort to show that it had not unjustly discriminated against the plaintiffs, and the plaintiffs offered rebutting evidence, and thereupon, the testimony being closed, the Court charged the jury (Record, p. 124), the charge being in part as follows:

> "The Commission has decided the manner of distribution of coal cars, and that is a question with which you have nothing to do. Their findings on that subject are conclusive, as far as this Court and jury are concerned." (Record, p. 127.)

And further:

> "The Commission's findings of fact you have heard read, and they find among other things that the practices employed in the distribution of coal cars in this particular case were unjust and discriminatory." (Record, p. 125.)

And further, the Court charged the jury that the finding of the fact and amount of damages which the plaintiffs had suffered, by reason of the unlawful discrimination of the defendant, was *prima facie* correct, and "it is entitled to weight with you as being correct on its face, unless the defendant has produced evidence to show that some other state of facts existed, and that the plaintiffs have not suffered the damages which the Commission has awarded to them." (Record, p. 127.)

Thereupon the jury, on the 4th day of March, 1913, found a verdict in favor of the plaintiffs, and assessed their "damages in the sum of $28,572.54." The defendant moved to set aside the verdict and for judgment *non obstante veredicto*, both of which motions were overruled by the Court (Record, p. 142), and on the 19th of May, 1913, the Court entered judgment for plaintiffs and also entered an order under Sections 8 and 16 of the Act to Regulate Commerce, directing that counsel for plaintiffs be allowed a counsel fee of $2,500 for services in the proceeding before the Interstate Commerce Commission, and a further fee of $2,500 for services in the proceeding in the District Court, to which allowances an exception was granted (Record, p. 142). To reverse this judgment, a writ of error was sued out in the Circuit Court of Appeals for the Third Circuit.

The Circuit Court of Appeals at October Term, 1913, certified certain questions, under Section 239 of the Judicial Code, to this Court (Record, p. 157), and

this Court, at October Term, 1914, by writ of certiorari, to the Circuit Court of Appeals, directed that the entire record and proceedings in the case should be certified and sent up to this Court, which was accordingly done.

ARGUMENT.

I. VIOLATION BY DEFENDANT OF SECTION 3 OF THE ACT TO REGULATE COMMERCE.

The proceeding before the Interstate Commerce Commission was brought to have the method of proportional distribution of coal cars by the Pennsylvania Railroad Company, in time of shortage, declared unlawful, and to secure an order of the Commission directing defendant to make reparation to plaintiffs for damages sustained by reason of violation by the defendant of Section 3 of the Act to Regulate Commerce, in that it unjustly discriminated against plaintiffs in the allotment of coal cars.

> "The prohibitions of Section 3 of the Commerce Act require that cars shall be fairly allotted to shippers without unjust discrimination or unfair preference."—*Morrisdale Coal Co. vs. Penna. R. R. Co.*, 230 U. S. 304, at page 312.

Section 3, therefore, fixed the duty which the defendant owed to the plaintiffs and their case was based, and could only be based, upon a violation by the defendant of this duty, under the Act to Regulate Commerce.

There is no defined and fixed method of *fair car distribution* prescribed by the Act to Regulate Commerce, and there is no definition in the Act of what is "unjust discrimination or unfair preference" in such car distribution, and therefore, there must be some tribunal with power and duty in its discretion to determine what

is fair, and whether a certain method of distribution, then in effect, is subject to the charge of "unjust discrimination or unfair preference." This tribunal is the Interstate Commerce Commission, as is clearly shown by the decision of this Court in the Morrisdale Coal Co. case (230 U. S. 304), which case involved the question of fairness of exactly the same method of car distribution, in the same period and in the same Clearfield Coal District, which is now before the Court in this case. In that case, this Court said, by Mr. Justice Lamar, at page 312:

> "But the statute does not define what is the proper method of distribution in case of car shortage, and at the time of the transactions out of which this suit arose, no general rule had been adopted by the carriers or promulgated by the Commission. As late as 1910, it was said (19 I. C. C. 387), that the question was in a state of flux, and an examination of the decisions in the numerous cases brought about that time will show that it was a matter about which there was much difference of opinion. In some cases it was held that private cars and fuel cars of foreign railroads, consigned to particular mines, should be counted in making the distribution. Others held that such cars should be counted, but that if the foreign cars, or those owned by the private corporations, exceeded their percentage, the excess might be retained by those coal companies. This view was adopted by the Commission, which also held that fuel cars belonging to the carrier should be counted except where the railroad purchased the entire output of the mine (cases cited).
>
> "It was, however, recognized *that there could be no hard and fast rule*, and that circumstances might arise which would otherwise warrant a departure so as to enable the carrier to meet emergencies arising from a strike on its own road, or embargoes by connecting lines which refused to

haul certain articles of merchandise in order to supply communities with necessaries of life. Parks v. Cincinnati, &c., Ry., 10 I. C. C. 47, Thompson v. Pennsylvania R. R., 10 I. C. C. 640.

"These rulings as to the validity of a particular practice and the facts that would warrant a departure from a proper rule actually in force, are sufficient to show that the question as to the *reasonableness of a rule of car distribution is administrative in its character and calls for the exercise of the powers and discretion conferred by Congress upon the Commission.* It was distinctly so ruled in the Pitcairn case, 215 U. S. 481, and in I. C. C. v. Illinois Central, 215 U. S. 452. Those cases involve a consideration of the power of the Commission over the distribution of cars, and held that the Courts could not by mandamus compel it to make a rule, nor by injunction restrain the enforcement of one it had promulgated. *If in those direct proceedings the Courts could not pass upon the question of reasonableness of a method of allotting cars, neither can it do so as an incident to an action for damages.*" (Italics ours.)

From the above we deduce the following:

1. Section 3 of the Act prohibits any method of car distribution which is unfair, or which results in unjust discrimination or unfair preference, and requires that the coal cars shall be fairly allotted.

2. There can be no "hard and fast rule" governing car distribution, but the "particular practice and the facts which would warrant a departure from a proper rule actually in force", so far as the reasonableness and fairness thereof is concerned, is within the *power and discretion* of the Commission, and the ruling of the Commission upon the "particular practice" is "administrative in its character."

3. This administrative question, calling for the

exercise of the discretion of the Commission, is one upon which the Courts may not pass judgment.

This last proposition is made certain by the opinion of this Court in recent cases. Thus in *Mitchell Coal Co. vs. Penna. R. R. Co.*, 230 U. S. 247, it is said, by Mr. Justice Lamar, at page 257:

> "But where the suit is based upon unreasonable charges or *unreasonable practices*, there is no law fixing what is unreasonable, and therefore prohibited. In such cases the whole scope of the statute shows that it was intended that the Commission and not the Court should pass upon that administrative question. When such order is made, it is as though the law for that *particular practice* had been fixed and the Courts could then apply that order, not to one case, but to every case—thereby giving every shipper equal rights and preserving uniformity of practice. *Section 9 gives the plaintiff the option of going before the Commission or the Courts for damages occasioned by a violation of the statute.* But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the practice or the rate was thus unreasonable and therefore illegal and prohibited." (Italics ours.)

And again the Court, in speaking of orders of the Commission, says (at p. 258):

> "*Such orders, so far as they are administrative, are conclusive*, whether they relate to past or present rates and can be given general and uniform operation, since all shippers, who have been or may be affected by the rate, can take advantage of the ruling and avail themselves of the reparation order." (Italics ours.)

And again the Court says (pp. 258-9):

> "In considering the administrative questions

as to reasonableness, the elements of the problem are the same, whether they involve the validity of obsolete allowances, discarded tariffs, or current rates and *practices*. In both classes of cases, there is a call for the exercise of the rate-regulating discretion and the same necessity for having the matter settled *by a single tribunal.*" (Italics ours.)

Also, in *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S., 121, this Court said (p. 131):

"But it must be borne in mind that there are two forms of discrimination—one in the rule and the other in the manner of its enforcement; one in promulgating a discriminatory rule, the other in the unfair enforcement of a reasonable rule. In a suit where the rule of practice itself is attacked as unfair or discriminatory, a question is raised which *calls for the exercise of the judgment and discretion of the administrative power which has been vested by Congress in the Commission.* It is for that body to say whether such a rule unjustly discriminates against one class of shippers in favor of another. Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. *When the Commission has declared the rule to be unjust*, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in Sec. 9. (Italics ours.)

And again (p. 133), this Court said:

"In the distribution of cars to coal companies it might be necessary to determine whether account should be taken of system cars, foreign cars, private cars and the company's own coal cars. In many cases the determination of such an issue would call *for the exercise of the regulating function of the Commission.* That was true in *Morrisdale Coal Co. v. Pennsylvania Railroad*, 230 U. S.

304, 312-314. There the plaintiff admitted that it had received all the cars to which it was entitled under the carrier's rule, but insisted that the rule itself was unreasonable and unjustly discriminatory since it took no account of private and foreign cars controlled by the mining company. *The reasonableness of the rule was a matter for the Commission.*" (Italics ours.)

And again (p. 130), this Court said:

"Construing, therefore, Secs. 8, 9 and 22 in connection with the statute as a whole, it appears that the Act was both declaratory and creative. It gave shippers new rights, while at the same time preserving existing causes of action. It did not supersede the jurisdiction of state courts in any case, new or old, where *the decision did not involve the determination of matters calling for the exercise of the administrative power and discretion of the Commission;* or relate to a subject as to which the jurisdiction of the Federal courts had otherwise been made exclusive. Compare *Abilene case*, 204 U. S. 439-446; *Robinson v. Balt. & Ohio*, 222 U. S. 506; 36 Stat. 551 (15); 38 Stat. 220." (Italics ours.)

So we may conclude that a finding of the Commission that the defendant had been guilty of *unjust discrimination* in its method of car distribution, as against the plaintiffs, in violation of Section 3 of the Act to Regulate Commerce, is a "*conclusive*" finding of fact upon an administrative question, and that it is beyond the competency of the Courts to re-examine the same.

The Commission in this case found:

1. "But Falcon No. 2 was not placed on an equal footing with the mines of the Berwind-White Coal Mining Company in the matter of the distribution of the defendant's available coal car equipment during the period of this action." (1st Report, Record, p. 64.)

This was a finding by the Commission upon *an administrative question*, that the defendant had not treated plaintiffs with equality as compared with Berwind-White Coal Mining Company, and that defendant had violated Section 3 of the Act to Regulate Commerce, known as the "Equality Section."

> 2. "For the reasons explained at some length in that case" (Hillsdale Coal & Coke Co. vs. Penna. R. R. Co) "those rules operated *as an undue discrimination against these complainants and we so find.* But for the present and for the reasons there explained, we shall limit our order to a finding that in the several respects here mentioned the defendant was guilty of a discrimination against these complainants, leaving for determination after further argument the question of the extent to which the complainants may have been damaged thereby." (1st Report, Record, p. 65.) (Italics ours.)

This was a finding by the Commission upon the administrative question before it, that the rules of car distribution enforced by the defendant unduly discriminated against plaintiffs, and therefore that defendant had violated Section 3 of the Act to Regulate Commerce.

3. By its order of March 7th, 1910 (Record, pp. 36, 37), the Commission found as follows:

> "It is ordered, That the said rule, regulation, and practice of the defendant in that behalf unduly discriminated against the complainants and other coal operators similarly situated, and is in violation of the third section of the Act to Regulate Commerce." (Order, Record, p. 66.)

This fact stated in the order of the Commission is a finding upon the administrative question before it, and should be given the effect required by law as above shown.

4. By its Supplemental Report (Record, p. 14), the Commission states:

> "We find that by reason *of the discriminations ascertained and set forth in our report* in Jacoby v. P. R .R. Co., 19 I. C. C. 392, the complainants *were* damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28th, 1907." (Supplemental Report, Record, p. 67.) (Italics ours.)

5. By its Supplemental Order (Record, p. 26), the Commission recites that it has made full investigation, refers to its original report, supplemental report, and findings of fact, all of which are made a part of the order, and

> "It is ordered, That the above named defendant" (The Pennsylvania Railroad Company) "be and it is hereby authorized and directed to pay unto complainant, W. F. Jacoby and Isaac C. Weber, trading as W. F. Jacoby & Company, on or before the 1st day of June, 1912, the sum of $21,094.39, with interest thereon at the rate of 6 per cent. per annum from June 20th, 1907, *as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust,* as more fully and at large appears in and by said reports of the Commission." (Supplemental Order, Record, pp. 69, 70.) (Italics ours.)

There cannot be a doubt that the Commission found that defendant had unjustly discriminated against plaintiffs; that the rules of car distribution enforced by defendant unjustly discriminated against plaintiffs; that defendant violated Section 3 of the Act to Regulate Commerce; and that this finding of the Commission was a finding upon an administrative question, which under the law was *"conclusive"* and could not properly be re-examined by the Courts.

The Commission having made this finding of violation of Section 3 of the Act, the District Court properly charged the jury, as to the effect to be given thereto, as follows:

> "The Commission has decided the manner of distribution of coal cars, and that is a question with which you have nothing to do. Their findings on that subject are conclusive, as far as this Court and jury are concerned." (Charge—Record, p. 127.)

II. THE EFFECT TO FOLLOW FROM THE FINDING OF THE COMMISSION THAT THE DEFENDANT HAD VIOLATED SECTION 3 OF THE ACT TO REGULATE COMMERCE.

Section 8 of the Act to Regulate Commerce is as follows:

> "Sec. 8. That in case any common carrier subject to the provisions of this act shall do, cause to be done, or permit to be done any act, matter, or thing in this act prohibited or declared to be unlawful, or shall omit to do any act, matter or thing in this act required to be done, such common carrier *shall be liable* to the person or persons injured thereby for the full amount of damages sustained in consequence of any such violation of the provisions of this act, together with a reasonable counsel or attorney's fee to be fixed by the court in every case of recovery, which attorney's fee shall be taxed and collected as part of the costs in the case." (Italics ours.)

This section, applied to the case now before this Court, brings us to the conclusion that the Commission, having found that the defendant violated Section 3 of the Act, in that it did what that Section prohibited, and this finding of the Commission being upon an admin-

istrative question and therefore to be taken as "conclusive" by the Courts, therefore, upon presentation of this finding of the Commission in the District Court, upon the trial of the case according to the procedure provided in Section 16, the Act to Regulate Commerce by Section 8 declares that "*such common carrier shall be liable.*"

As was said by this Court in *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121, at p. 127:

> "Section 3 of the Commerce Act makes it unlawful for the carrier to unduly prefer one shipper over another. Section 8 gives a right of action against the carrier for damages occasioned by his doing an act prohibited by the statute."

Of course, before recovery it was necessary for the plaintiffs to show that they were the "persons injured thereby", and what was "the full amount of damages sustained in consequence of any such violation of the provisions of this act", and this we will hereafter consider.

III. PLAINTIFFS PROCEEDED, AS WAS NECESSARY, BY COMPLAINT TO THE COMMISSION THAT THEY WERE INJURED BY DEFENDANT'S VIOLATION OF THE ACT, AND PRAYED FOR AN AWARD IN THE AMOUNT OF THE "DAMAGES SUSTAINED IN CONSEQUENCE OF * * * SUCH VIOLATION OF THE PROVISIONS OF" THE ACT.

If a person claims that a carrier is liable to him under Section 8 of the Act because he was injured by the carrier's "violation of the provisions of this act", and that he has "sustained" damages "in consequence of any such violation of the provisions of this

act", he has two forums open to him under Section 9 of the Act, which is as follows:

> "Sec. 9. That any person or persons claiming to be damaged by any common carrier subject to the provisions of this act may *either make* complaint to the Commission as hereinafter provided for, *or may* bring suit in his or their own behalf for the recovery of the damages for which such common carrier may be liable under the provisions of this act in any district or circuit court of the United States of competent jurisdiction; but such person or persons shall not have the right to pursue both of said remedies, and must in each case elect which one of the *two methods of procedure herein* provided for he or they will adopt," etc. (Italics ours.)

Under this section the plaintiffs had the option to proceed either before the Commission or in the Courts for the enforcement of the liability of the defendant to them under Section 8 of the Act. Thus, in the Mitchell case, 230 U. S. 247, at page 257, it is said:

> "Section 9 gives the plaintiff the option of going before the Commission or the Courts *for damages occasioned by a violation of the Statute.* But since the Commission is charged with the duty of determining whether the practice was so unreasonable as to be a violation of the law, the plaintiff must, as a condition to his right to succeed, produce an order from the Commission that the *practice or the rate was* thus unreasonable and therefore illegal and prohibited." (Italics ours.)

This option of the plaintiffs is limited, however. as just indicated, by the decision of this Court in the Abilene Cotton Oil Co. case, 204 U. S. 426, and other cases, requiring that when the question involved requires the exercise of administrative discretion for its determination, it is necessary to first have an order

from the Commission "that the practice or the rate was thus unreasonable and therefore illegal and prohibited."

The present case was based upon the determination of the question, in the exercise of administrative discretion, whether the defendant had violated Section 3 of the Act and it was, therefore, necessary that the plaintiffs should in the first instance proceed before the Commission, and in doing so they, under Section 9 of the Act, made "complaint to the Commission * * * for the recovery of *the damages for which such common carrier may* be liable under the provisions of this Act", and as this Court said (Mitchell case, *supra*):

> "Section 9 gives the plaintiff the option of going before the Commission or the Courts *for damages* occasioned by a violation of the statute." (Italics ours.)

This procedure before the Commission was what was called by Judge Lanning, in *Morrisdale Coal Co. vs. Penna. R. R. Co.*, 183 Fed. 929, at page 934, "a substituted right of procedure before the Commission", instead of "a common law right of action", and by Section 9 is spoken of as one of "*two methods of procedure*".

In *Pennsylvania R. Co. v. Puritan Coal Co.*, 237 U. S. 121, this Court said (p. 129):

> "While the Hepburn Act, as a convenience to shippers, permitted suits on Reparation Orders to be brought in the Federal court of the District where the plaintiff resided or the Company had its principal office; and while the act of 1910 (36 Stat. 554) in further aid of shippers, permitted suits on Reparation Orders to be brought in state or Federal courts, it made no change in Secs. 8 and 9 which, as shown above, gave the shipper the option to make complaints to the Commission or to bring suit in a United States court.

"2. But Secs. 8 and 9 standing alone might have been construed to give the Federal courts exclusive jurisdiction of *all suits for damages* occasioned by the carrier violating any of the old duties which were preserved and the new obligations which were imposed by the Commerce Act. And, evidently, for the purpose of preventing such a result, the Proviso to Sec. 22 declared that 'nothing in this act contained shall in any way abridge or alter the remedies now existing at common law or by statute, but the provisions of this act are in addition to such remedies'."

"That proviso was added at the end of the statute,—not to nullify other parts of the Act, or to defeat rights or remedies given by preceding sections,—but to preserve all existing rights which were not inconsistent with those created by the statute." (Italics ours.)

And again (p. 131), this Court said:

"Until that body has declared the practice to be discriminatory and unjust no court has jurisdiction of a suit against an interstate carrier for damages occasioned by its enforcement. When the Commission has declared the rule to be unjust, redress must be sought before the Commission or in the United States courts of competent jurisdiction as provided in Sec. 9."

In *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456, a case arising out of the same discriminatory practices here in question as applied by the same defendants to other shippers in the same region, this Court said (p. 468):

"1. The question whether the rule or method of car distribution practiced by the railroad company was unjustly discriminatory was one which the Commission had authority to pass upon. * * * Further, by reason of the nature of the question involved in an attack upon the rule or method of

the Company in distributing cars, no action was maintainable in any court to recover damages alleged to have been inflicted thereby until the Commission had made its finding as to the reasonableness of the rule. * * * *

The Commission also had authority to make examination and report upon *the amount of damages* which the plaintiff had suffered from the unjust discrimination alleged in its complaint. We deem the provisions of the Act to be clear upon this point. See Secs. 8, 9, 13, 16. (Italics ours.)

And again (p. 471), this Court said:

"It is said that the present action is brought to recover damages caused by the violation or discriminatory enforcement of the carrier's own rule, and that in such case, no administrative question being involved, resort to the Commission was not necessary. And this, it is urged, was held in *Penna. R. R. v. Puritan Coal Co.*, 237 U. S. 121. See also *Illinois Central R. R. v. Mulberry Hill Coal Co.*, decided June 14th, 1915, *ante* P. 275. The distinction, however, is apparent. In the cases cited the plaintiff had not invoked the jurisdiction of the Commission. In this case, it had done so. It went before the Commission, with its complaint under the Act, assailing the rule of the Company, and it secured from the Commission a finding as to the illegality of the rule and the violation of the Act. This proceeding established the character of the claim so far as interstate transactions were concerned, and it could be prosecuted solely under the Federal Statute. * * * * The Federal Statute governed the plaintiff no less than the defendant. In the situation in which the plaintiff stood after the Commission's finding, *that statute determined the extent of the damages it was entitled to recover* with respect to interstate sales and shipments, and the plaintiff was not free to seek another remedy in the state court and there to secure treble damages under the State statute with respect to the same transactions." (Italics ours.)

Plaintiff-in-error, in its brief (p. 44), has endeavored to distinguish the finding of this Court in the Clark case, saying:

> "All that this Court decided in that case was that, when a shipper invoked the jurisdiction of the Commission in order to secure a finding as to the legality of a carrier's rule of car distribution, it thereby established the character of its claim for damages resulting from the enforcement of an unjust rule so far as its interstate transactions were concerned, and, consequently, such a claim could be prosecuted solely under and in accordance with the provisions of the Interstate Commerce Act."

But the opinion of this Court in the Clark case (arising out of the very same discrimination here complained of) is most pertinent. What this Court decided in the Clark case was, that the shipper, complaining of discriminatory practices in car distribution, could either bring suit at common law or in a State court, or could proceed before the Interstate Commerce Commission to obtain an administrative finding of fact as to the discriminatory character of the practices complained of; but, having gone before the Commission, and having obtained before it a finding that Section 3 had been violated, the shipper could no longer pursue any other remedies than those prescribed by the Act for a violation of its provisions. In so ruling, this Court clearly contemplated that the Commission's administrative finding as to the discriminatory nature of the practices in question and the consequent violation of Section 3 was conclusive; otherwise a shipper, after electing his remedy and thereby debarring himself from a proceeding on the original facts at common law or in a State tribunal, might be met, on appeal, with a contention that the Commission was wrong, and

that Section 3 had not been violated, this being based on facts not adduced before the Commission, or on only a few of the facts there presented; a result so remarkable that it was manifestly never contemplated by this Court.

The case of *Penna. R. R. Co. vs. International Coal Mining Co.*, 230 U. S. 184, illustrates the case of the plaintiff, who, proceeding under Section 2 of the Act, exercised his option under Section 9, to adopt the other, of the "two methods of procedure", and sue, in the first instance, in the Courts, since there was no question involved which required the exercise of administrative discretion. The two procedures are entirely unlike, either may be adopted in appropriate cases, but the rules of evidence upon the trial in Court, which must ultimately come under both procedures, are entirely different, when the petition is filed in Court to "enforce an order for the payment of money" (Section 16), from the rules as to proof when the action is in Court in the first instance, as we will hereafter show.

IV. PROCEDURE BY PLAINTIFFS BEFORE THE COMMISSION WAS IN THE APPROPRIATE AND NECESSARY FORUM, AND WAS AUTHORIZED BY SECTION 9, AND FOLLOWED THE PROVISIONS OF SECTION 13.

Plaintiffs' case involving a question of administrative discretion, they necessarily proceeded before the Commission "for the *recovery of the damages for which such common carrier may be liable under the provisions of this Act*" (Section 9), and the procedure at the time of complaint, in 1907, was provided by Section 13 of the Act, as follows:

> "Sec. 13. That any person, firm, corporation or association or any mercantile, agricultural, or

manufacturing society, or any body politic or municipal organization complaining of anything done or omitted to be done by any common carrier, subject to the provisions of this act in contravention of the provisions thereof, may apply to said Commission by petition, which shall briefly state the facts; whereupon a statement of the charges thus made shall be forwarded by the Commission to such common carrier, who shall be called upon to satisfy the complaint or to answer the same in writing within a reasonable time, to be specified by the Commission. If such common carrier within the time *specified shall make reparation* for the injury alleged to have been done, said carrier shall be relieved OF LIABILITY to the complainant only for the particular violation of law thus complained of. If such carrier shall not satisfy the complaint within the time specified, or there shall appear to be any reasonable ground for investigating said complaint, it shall be the duty of the Commission to investigate the matters complained of in such manner and by such means as it shall deem proper", etc. (Italics ours.)

The plaintiffs in this case followed Section 13 and filed their petition, complaining of such violation by the defendant of Section 3 of the Act, as made defendant liable under Section 8, and further claiming damages which they sustained, and which, if proven, entitled them to recover, (Section 8). They were authorized to proceed for such purpose by Section 9, and Section 13 required the Commission to investigate the plaintiffs' "particular" claim, unless "within the time specified" such common carrier, defendant, "shall make *reparation* for the injury alleged to have been done."

In this case the defendant did not "make reparation", and therefore the Commission made the investigation required of it by Section 13.

V. DUTY OF THE COMMISSION AFTER INVESTIGATION OF PLAINTIFFS' COMPLAINT.

The Commission having made investigation of plaintiffs' complaint in this case, and having heard all the evidence presented by both plaintiffs and defendant, and the argument of counsel, was required by Section 14 to make a report, as follows:

> "Sec. 14. That whenever an investigation shall be made by said Commission, it shall be *its duty* to make a report in writing in respect thereto, which *shall* state the conclusions of the Commission, together with its decision, order, or requirement in the premises; *and in case damages are awarded, such report shall include the findings of fact on which the award is made,"* etc. (Italics ours.)

The Commission is required to make a report in writing, which report shall (1) state the conclusions of the Commission, "together with its decision, order or requirement in the premises"; and (2) "in case damages are awarded, such *report shall include"* along with the "conclusions", "decision, order or requirement" of the Commission, "the findings of fact on which the award is made", all to be in one report, but only "the findings of fact on which the award is made" are required to be included.

When we consider what are "the findings of fact" to be *included* in the report as the basis upon "which the award" of damages "is made", these must be such facts as by Section 8 are made the basis (1) of defendant's liability; (2) of plaintiffs being "injured thereby", and (3) of the "full amount of damages sustained in consequence of" the violation by defendant "of the provisions of this act". If these facts are found by the Commission, there can be no doubt that

they are the facts upon which, the Act declares, the "award" of damages shall be made", for Section 16 of the Act provides:

> "Sec. 16. That if, after hearing on a complaint made as provided in Section 13 of this Act, the Commission shall determine that any party complainant is entitled to an *award* of damages under the provisions of this Act *for a violation* thereof, the Commission shall make an order directing the carrier to pay to the complainant the sum to which he is entitled on or before a day named." (Italics ours.)

The basis of the "award of damages" which the Commission is required to make under this Section 16 is (1) the "violation" of the provisions of the Act by defendant; (2) that plaintiffs are entitled to the award because "injured thereby", and (3) the "sum to which" plaintiffs are entitled as "an award of damages".

These are the "findings of fact" which Section 14 requires the Commission to "include" in its report with its "conclusions", "decision, order or requirement."

In *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412, this Court said (p. 427):

> "Another objection which was directed against the orders as well as the reports is that they contain no findings of fact or at least not enough to sustain an award of damages. The arguments advanced to sustain this objection proceed upon the theory that the statute requires that the reports, if not the orders, shall state the evidential rather than the ultimate facts, that is to say, the primary facts from which through a process of reasoning and inference the ultimate facts may be determined. We think this is not the right view of the statute and that what it requires is a finding of the

ultimate facts—a finding which, as applied to the present case, would disclose (1) the relation of the parties as shipper and carrier in interstate commerce; (2) the character and amount of the traffic out of which the claims arose; (3) the rates paid by the shipper for the service rendered and whether they were according to the established tariff; (4) whether and in what way unjust discrimination was practiced against the shipper from November 1, 1900, to August 1, 1901; (5) whether, if there was unjust discrimination, the shipper was injured thereby, and, if so, the amount of his damages; (6) whether the rate collected from the shipper from August 1, 1901, to July 17, 1907, was excessive and unreasonable and, if so, what would have been a reasonable rate for the service; and (7) whether, if the rate was excessive and unreasonable, the shipper was injured thereby, and, if so, the amount of his damages. Upon examining the reports as set forth in the record, we think they contain findings of fact which meet the requirements of the statute and that the facts stated in the findings, if taken as *prima facie* true, sustain the award of the Commission."

Remembering that the Meeker case was a suit for damages arising from the charge of discriminatory rates, while the present suit is to recover damages arising from discriminatory practices in the distribution of cars, it will be found that the reports and orders of the Commission put in evidence in the present case contain findings of fact analogous to those contained in the reports and order in evidence in the Meeker case; And there can, therefore, be no doubt as to the sufficiency of such facts to take the case to the jury.

The plaintiff in error, in its brief filed in this case, has sought to distinguish the Meeker case on the ground that the report in that case showed, *inter alia*, "whether and in what way unjust discrimination was practiced

against the shipper." This, it argues, indicates that the reports and orders, offered in evidence, in order to be sufficient must show in detail just how the discriminatory rate or practice was applied. Of course the whole trend of this court's reasoning in the Meeker cases, sufficiently indicates that this court had no such intention as the plaintiff in error imputes to it. It is unnecessary, however, to argue this question, since this court in the more recent case of *Mills v. Lehigh Valley Railroad Co.*, 238 U. S. 473, has ruled upon this very matter. In that case, a proceeding was instituted before the Commission by a shipper, alleging that certain rates were excessive, unreasonable and unjustly discriminatory. "The first report of the Commission was concerned only with the rates which should be charged. No reparation was allowed, and no findings whatever made as to damages" (p. 478). A second report was then filed. This report set forth (p. 478), that:

> "In the report made by this Commission following an inquiry into the reasonableness of the rate of $2 per gross ton exacted by the defendants for the transportation of pyrites cinder from Buffalo, N. Y., to points in the States of Pennsylvania and New Jersey the rate was found excessive, and the defendants were ordered to establish a rate not to exceed that contemporaneously applying on shipments of iron ore between the same points. Reparation was denied. *Naylor & Co. v. L. V. R. R. Co.*, 15 I. C. C. Rep. 9.
>
> "Pursuant to the Commission's order the defendants reduced the rate on pyrites cinder to $1.45, the rate on iron ore. The complainant thereupon filed a motion for rehearing upon the question of reparation, and after consideration by the Commission the motion was granted. Additional evidence was taken and the parties were heard in oral argument.
>
> "We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the

shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton. Complainant is entitled to reparation on all shipments moving within the period of the statute of limitations. *Detroit Chemical Works v. N. C. Ry. Co.*, 13 I. C. C. Rep. 357; *Same v. Erie R. R. Co.*, 13 I. C. C. Rep. 363."

The report then proceeded to fix the sums which the various defendants would be "required to refund to the complainant * * * * as reparation for the collection of unreasonable charges on" so many carloads of the product shipped. This was followed by an award. Suit was brought on the award and judgment rendered for the amount named by the Commission. On appeal to the Court of Appeals, judgment was reversed on the grounds that (p. 477):

> "First, that there were no sufficient findings of fact in the reports of the Commission, as required by the statute; and, second, that the plaintiffs had failed to present any evidence which made out a *prima facie* case of damage sustained. That is, it is said that if the statements in the first report of the Commission could be regarded as findings of fact within the meaning of the statute so as to make them *prima facie* evidence of the facts found, they were not sufficient to support the plaintiffs' claim; and that there were no facts found in the second report which entitled the plaintiffs to go to the jury."

This court, in reversing the judgment of the Circuit Court of Appeals, held, in effect, that the second report of the Commission (quoted in part *supra*), was in itself a sufficient finding of facts to take the case to the jury, saying (p. 480):

> "This report, it will be observed, shows the relation of the parties as shipper and carrier in

interstate commerce; the general character of the traffic involved and the amount of the shipment with respect to which reparation was claimed; the determination that the rate exacted (which was specified) was unjust and unreasonable to the extent that it exceeded the established rate (also specified); and, further, the determination that the companies respectively should pay a stated amount 'as reparation for the collection of unreasonable charges' on the quantities mentioned. It is at once apparent that these findings meet the test laid down in the *Meeker case* unless it can be said that they were insufficient as to the amount of damages suffered. Thus, there would seem to be no room for question that the finding that the rate charged was unreasonable is a sufficient finding. The Commission stated: 'We now find that the rate of $2 per gross ton, assessed and collected by the defendants on the shipments giving rise to complaint, was unjust and unreasonable to the extent that it exceeded the subsequently established rate of $1.45 per gross ton.' It is insisted that, in view of the provisions of the first order, and the Commission's description of it in the second report, the essential basis of the ruling was not the inherent reasonableness of the rate established but its relation to the rate on a competitive commodity. We think, however, that the specific finding in the second report that the rate exacted 'was unjust and unreasonable' to the extent specified, *was a finding as to the ultimate fact of unreasonableness which should be taken precisely as made.* The finding in this respect is substantially the same as that in the second *Meeker case* (236 U. S. 434, 435, 436)." (Italics ours.)

The reports and findings of the Commission in the Mills case were practically identical with those in evidence in the present case. In the Mills case, there was, first, a general report containing certain findings of fact and a discussion of those facts, together with a determination of the unjust and discriminatory char-

acter of the rates charged; this was followed by a short report, reciting merely the fact that the rates were unjust and discriminatory, and determining the amount of complainant's damage; and this was followed by a formal award of reparation. Exactly the same course was followed by the Commission in the present case, the only difference being that, in the present case, the Commission passed upon a question of practices and not of rates. But it was expressly held by this Court in *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456 (p. 470), that the authority of the Commission to determine the discriminatory nature of practices relating to car distribution and to award damages to persons injured thereby, is just as certain as its power to determine questions as to rates and to award damages for injustice or discrimination in connection therewith.

We have shown the Court the findings of fact made by the Commission in this case on which Section 8 declares the liability of the defendant. We now proceed to the "findings of fact", showing liability to the plaintiffs and "the sum to which" they are "entitled".

VI. THE DEFENDANT HAVING VIOLATED THE PROVISIONS OF THE ACT, THE COMMISSION FOUND THAT THE PLAINTIFFS WERE "INJURED THEREBY" AND SUFFERED LOSS AMOUNTING TO $21,094.39, WITH INTEREST FROM JUNE 28TH, 1907, WHICH AMOUNTED TO THE SUM COVERED BY THE JUDGMENT OF THE DISTRICT COURT.

By its Supplemental Report of March 11th, 1912, (Record, pp. 18, 67, 68), the Commission found as follows:

"We find that by reason of the discrimina-

> tions ascertained and set forth in our report in Jacoby v. P. R. R. Co., 19 I. C. C. 392, *the complainants were damaged* to the *extent of $21,094.39*, which *they are entitled to recover* with interest from June 28th, 1907." (Italics ours.)

In this finding of fact is found every essential element upon which to show, under Section 8, the liability of the defendant *to the plaintiffs* and the amount of damage "sustained" by the plaintiffs, and it also is the essential finding of fact "on which the award is made", and which by Section 14 must be *included* by the Commission in its report.

The Commission, however, went further and found the detailed facts which "measures the loss on the tonnage which the complainants were unable to ship" (Record, p. 68 [d]), and which constituted the "basis adopted for computing the loss sustained by these complainants in diminished profits on the coal actually shipped during the period in question." (Supplemental Report, Record, pp. 67, 68.)

The Commission then entered its Supplemental Order (Record, pp. 26, 69), as required by Section 16, directing the defendant to pay to plaintiffs the sum found by it

> "as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission."

In *Mills vs. Lehigh Val. Ry. Co.*, 238 U. S. 473, this Court said (p. 481):

> "As to the amount of damage sustained, there would be no question if the Commission had found, as in the case last cited, that the shipper 'was damaged' to the amount mentioned. The distinction attempted to be drawn is that in the case referred to there was a statement that the shipper 'was

damaged' while in the present case the Commission held that he was entitled to the stated amount 'as reparation'. In both cases, the amount actually allowed was the difference between the amount charged and that which would have been payable at the rate sanctioned. The difference between the findings in the two cases, we think, is merely in the form of words used.

"When the Commission made the award *'as reparation'* they undoubtedly expressed the decision as a matter of ultimate fact, that there was injury to this extent to be repaired. No other intelligent construction can be put upon their statement. If, as was held in the second *Meeker case*, a finding of the amount of damage as a finding of ultimate fact is sufficient, the expression of that finding is not confined to a particular formula. What the Commission decided was that the shippers were entitled to reparation, that is, to be made whole, to be compensated for a loss because of an illegal and unreasonable exaction, and the amount which they stated as the sum to be paid 'as reparation' on the specified shipments was the amount which they found necessary to accomplish the reparation,—to afford the compensation. The statute was not concerned with mere forms of expression and in view of the decision that a finding of the ultimate fact of the amount of damage is enough to give the order of the Commission effect as *prima facie* evidence, we think that the trial court did not err in its ruling. The statutory provision merely established a rule of evidence. It leaves every opportunity to the defendant to contest the claim. But when the Commission has found that there was damage to a specified extent, *prima facie* the damage is shown; and, according to the fair import of its decision, the Commission did find the amount of damage in this case."

In the present case the Commission found that "the complainants were damaged to the extent of $21,094.39, which they are entitled to recover with interest from June 28th, 1907", (Record, p. 18); and subse-

quently ordered defendant to pay this sum "as reparation for defendant's discrimination in distribution of coal cars, which discrimination has been found by this Commission to have been unlawful and unjust, as more fully and at large appears in and by said reports of the Commission." (Record, p. 26.)

We have shown from the reports and orders of the Commission the findings of fact which were essential (1) to establish the liability of the defendant; (2) to show that plaintiffs were "injured thereby", and (3) the amount in damages "sustained" by plaintiffs; which were the essential findings of fact under Section 8 upon which to base liability of the defendant to the plaintiffs for the amount found, and which were the findings of fact under Section 14, *to be included* in the report and "on which the award is made". We have also shown the order of the Commission under Section 16, "directing the carrier to pay to the complainants the sum to which he is entitled on or before a day named", and it remains to show the effect to be given to these findings of fact and orders of the Commission in the further conduct of plaintiff's case.

VII. THE ACT, SECTION 16, PROVIDES A STATUTORY PROCEEDING AGAINST A DEFENDANT CARRIER, WHO "DOES NOT COMPLY WITH AN ORDER FOR THE PAYMENT OF MONEY", AND DECLARES THE EFFECT TO BE GIVEN, BY THE COURTS, TO "FACTS" STATED IN THE "FINDINGS AND ORDER OF THE COMMISSION."

Section 16 of the Act provides:

> "If a carrier does not comply with an order for the payment of money within the time limit in such order, the complainant or any person for

whose benefit such order was made, may file in the Circuit Court of the United States for the district in which he resides or in which is located the principal operating office of the carrier, or through which the road of the carrier runs, or in any State Court of general jurisdiction having jurisdiction of the parties, a petition setting forth briefly the causes for which he claims damages, and the order of the Commission in the premises. * * * * All complaints for the recovery of damages shall be filed with the Commission within two years from the time the cause of action accrues, and not after, AND A PETITION FOR THE ENFORCEMENT OF AN ORDER FOR THE PAYMENT OF MONEY shall be filed in the Circuit Court or State Court within one year from the date of the order, and not after."

This Section fixes and establishes the *statutory procedure.* It is not the ordinary suit for damages, at common law, but "A PETITION FOR THE ENFORCEMENT OF AN ORDER FOR THE PAYMENT OF MONEY."

Section 16 also provides:

> "Such suit shall proceed in all respects like other civil suits for damages, except that on the trial of such suit the findings and order of the Commission shall be *prima facie* evidence of the facts therein stated." etc.

This, under the construction put thereon by this Court, fixes the effect to be given to the facts in the findings and order of the Commission upon the "petition for the enforcement of an order for the payment of money."

We have shown (*supra*) that the finding of the Commission that defendant had been guilty of "unjust discrimination" and had violated Section 3 of the Act, was a finding of fact "conclusive" in the Courts,

and that upon such evidence, Section 8 declares that the carrier "shall be liable". We now show that the finding by the Commission of the fact that plaintiffs were damaged and the amount thereof, must have been taken by the jury as *prima facie* correct, and unless they believed that the defendant's evidence rebutted the *prima facie* effect to be given to the findings of fact by the Commisison, they should, in view of Section 8 of the Act, have found for the plaintiffs. This was the view presented in the charge of the learned trial Court, and *upon this issue of fact* the jury found for the plaintiffs, and we submit that there was no error in the lower Court prejudicial to the defendant, and that the judgment should be affirmed.

In the report of the Committee on Interstate Commerce, of January 18th, 1886, which is a review of the purposes of the Act to Regulate Commerce, as originally passed by Congress, it is said (p. 214):

> "Nor is it proposed to compel any citizen to rely solely upon the Commission recommended by this Committee, or to debar him from seeking redress from grievances from the judicial tribunals of the United States if he shall prefer to have recourse to them. On the contrary, it is expressly provided that he shall be free to pursue his remedy at common law or *under the statute herein recommended,* at his own discretion. It is not proposed to in any manner restrict the choice of remedies now available, but it is proposed to provide *additional means of obtaining redress with much less difficulty* and expense, and to render those already existing very much more effective.
>
> "This can best be accomplished, it is believed, *by making the reports and recommendations of the Commission prima facie evidence as to the facts found in all cases which it investigates.* This would do more towards placing the shipper upon an equality with the carrier in a legal controversy

than anything else that has been suggested, and would to a considerable extent, obviate the almost insurmountable difficulties now encountered by the shipper.

"With such a change in the rules of evidence, a favorable report by the Commission *would substantially establish the case of the complainant, should judicial proceedings become necessary, as it would lift from his shoulders the burden of proof and transfer it to the carrier.*" (Italics ours.)

That the purpose of the Act was to make "a favorable report of the Commission * * * * *establish the case of the complainant should judicial proceedings be necessary,*" as stated in the report above set forth, was declared by this Court in the *Mitchell Coal Co.* case, 230 U. S. 247, at page 258, as follows:

"Such orders, so far as they are administrative, are conclusive, whether they relate to past or present rates, and can be given general and uniform operation, since all shippers who have been or may be affected by the rate can take advantage of the ruling and avail themselves of the reparation order. They are quasi-judicial, and only *prima facie* correct in so far as they determine the fact and amount of damage—as to which, since it involves the payment of money and taking of property, the carrier is by Section 16 of the Act given its day in Court and the right to a judicial hearing, (March 2, 1889, 25 Stat. 855, 859, c. 382).

"In considering the administrative questions as to reasonableness, the elements of the problem are the same, whether they involve the validity of obsolete allowances, discarded tariffs, or current rates *and practices.* In both classes of cases there is a call for the exercise of the rate-regulating discretion and the same necessity for having the matter settled by a single tribunal." (Italics ours.)

In *Pennsylvania R. R. Co. v. Clark Coal Co.*, 238 U. S. 456, the Court said (p. 469):

> "There is nothing in the Act to suggest that the damages which may thus be ascertained are only those arising from unreasonable or unjustly discriminatory rates. Rules as to car distribution that are unjustly discriminatory are within the purview of Section three, and damages thereby occasioned, as well as those due to the exaction of unreasonable rates, arise from the violation of the Act and their ascertainment is within the scope of the Commission's authority."

So that the effect to be given to the findings of the Commission is equally applicable to questions affecting rates or practices, and when this case was submitted to the jury upon the findings of fact by the Commission, and the evidence presented by defendant and plaintiffs, a simple issue of fact was presented upon which the jury found for the plaintiffs, and a careful examination of the charge of the learned Judge of the Court below will show that he followed carefully the view of the law which is above presented, and which has been affirmed by this Court.

The effect which is to be given to such reports and findings of the Commission, including the award of damages has been finally established by this Court in *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 412. In that case this Court said (p. 428):

> "But it is said that the reports disclose that the Commission applied an erroneous and inadmissible measure of damages, and therefore that no effect can be given to the award. What the reports really disclose is that the Commission, 'upon consideration of the evidence adduced upon the hearing upon the question of reparation' found (a) that by reason of the unjust discrimination resulting from giving the rebate to the Lehigh Valley Coal Company, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid from Nov. 1, 1900, to Aug. 1,

1901, and what they would have paid had they been dealt with on the same basis as was the Coal Company, and (b) that by reason of being charged an excessive and unreasonable rate from August 1, 1901, to July 17, 1907, Meeker & Company were 'damaged to the extent of the difference' between what they actually paid and what they would have paid had they been given the rate which the Commission found would have been reasonable. In this we perceive nothing pointing to the application of an erroneous or inadmissible measure of damages. * * * * * the plain import of the findings is that the amounts awarded represent the claimant's actual pecuniary loss; and, in view of the recital that the findings were based upon the evidence adduced, it must be presumed, there being no showing to the contrary, that they were justified by it."

And in *Meeker v. Lehigh Valley R. R. Co.*, 236 U. S. 434, where the entire evidence presented by the plaintiff consisted of the report, findings and award of the Commission, this Court said (p. 439):

> "The case made by the evidence rightly admitted was such as, in the absence of any opposing evidence, and there was none, clearly entitled the plaintiff to a verdict for the amount claimed. Every fact essential to a recovery, save the service of the reparation order and the refusal to comply with it, was *prima facie* established by the findings and order of the Commission and these could not be rejected by the jury in the absence of any countervailing evidence."

The same rule is as forcibly and even more explicitly announced in *Mills vs. Lehigh Valley Railroad Com Company*, 238 U. S. 473.

The District Court allowed to counsel for plaintiff a counsel fee of twenty-five hundred ($2500.00) dollars for services in the proceedings before the Interstate

Commerce Commission, which allowance, under the case of *Meeker & Co. vs. Lehigh Valley Railroad Company*, cannot be sustained, and we ask this Court to correct the judgment of the District Court in that particular.

After so correcting the judgment of the District Court we submit that the same should be affirmed.

THE BRIEF FOR PLAINTIFF-IN-ERROR.

1. In the brief of learned counsel for plaintiff-in-error, the contention is made (page 17) that the:

> "evidence adduced by defendants-in-error" is "insufficient to establish a *prima facie* case."

In reply to this, we refer to our presentation in this brief of the facts found in the report, supplemental report and orders of the Interstate Commerce Commission, and submit that thereby, every essential fact was found by the Commission, which was necessary under the decisions of this Court to establish the discrimination practiced by the carrier, the injury to the defendants-in-error and the amount of their damage. The complaint of the counsel for plaintiff-in-error seems to be that the Commission's report does not set forth in detail the evidence upon which the finding or conclusion of the Commission was based. We submit that under the decisions of this Court in the Meeker case, 236 U. S. 412, at p. 427, and the Mills case, 238 U. S. 473, at p. 481, this was unnecessary. It was necessary for the defendants-in-error to show to the Interstate Commerce Commission, in what manner they had been unfairly treated and the details thereof, and this was clearly presented to the Commission; but it was entirely unnecessary for the Commission to recite at length in its report the details of how, day by day,

the discrimination was practiced in the car distribution. The essential and *ultimate facts* were found by the Commission, that the carrier had unjustly discriminated against the defendants-in-error, that they were injured thereby and the amount of their damages, which establishes a *prima facie* case for the defendants-in-error.

Complaint is made by counsel for plaintiff-in-error that:

> "The Commission nowhere found what number of cars the plaintiff-in-error distributed in the region in which the defendants-in-error's mine was located, what number of these were available for allotment and distribution among shippers generally, nor what the relation was between the capacity of the defendants-in-error's mine and the capacity of all the mines in the region, all of which facts were not only important but essential in arriving at any determination as to the number of cars which the defendants-in-error should have received." (Brief, p. 18.)

Evidence covering every one of these suggestions was important, and was presented to the Commission, and the Commission found from this evidence the fact that the carrier had unjustly discriminated, in its car distribution, against the defendants-in-error, and this was the ultimate fact which it was necessary that the Commission should find before the defendants-in-error could recover, but it was unnecessary for the Commission to recite the evidence upon which this *ultimate fact* was based.

Counsel for plaintiff-in-error say (page 19):

> "The Interstate Commerce Act, while authorizing actions of the character of the present one, requires that they 'shall proceed in all respects like civil suits for damages, except that on the trial

> of such suit the reports and orders of the Commission shall be *prima facie* evidence of the facts therein stated'. It results from this that the plaintiff or petitioner in such an action as the present one, is not relieved from the burden of proving every fact which in an action of law for damages he would be required to prove."

It would seem that the view here expressed is that the defendants-in-error could not rely upon the *ultimate facts* of discrimination, injury and damage found by the Commission, to establish a *prima facie* case, but that in proceeding to enforce the order of the Commission, it was necessary to again offer in Court, in order to make a *prima facie* case, all of the evidence upon which the Commission's ultimate conclusion of fact was based. Such a position, we submit, is entirely disposed of by the cases decided by this Court and referred to above.

2. Counsel for plaintiff-in-error say (Brief, p. 23):

> "Even if the reports of the Commission established a *prima facie* case, evidence adduced by plaintiff-in-error established that the defendants-in-error were not entitled to the cars which the Commission held they should have received."

This is an effort to negative the finding of the Commission upon the administrative question of what system of car distribution should have been in effect, and what cars in the service of the carrier should have been distributed thereunder, and what percentage thereof the defendants-in-error were entitled to. The finding of fact by the Commission that the system of distribution of cars practiced by the plaintiff-in-error was unjust and unduly discriminatory, as against the defendants-in-error, and the further finding of what

should have been the system of distribution, and what cars should have been distributed thereunder, was an administrative finding of the Commission, and we submit that, under the cases referred to in this brief, such finding was conclusive in the Courts. But even if it was not conclusive, the plaintiff-in-error presented its evidence to the jury, and the jury found for the defendants-in-error, and we submit that this Court will not now review the system of car distribution and reverse the Commission's administrative conclusion thereon, supported by the verdict of the jury.

In this case, before the Commission, the preferences in car distribution to the Berwind-White Coal Mining Company were clearly shown, and, while there is nothing to justify the conclusion of counsel for plaintiff-in-error that the Commission based its award of damages, on the difference in treatment between the Berwind-White Company and the defendants-in-error, counsel for plaintiff-in-error make this assertion, and then cite the case of *Pennsylvania R. R. Co. v. International Coal Mining Co.*, 230 U. S. 184, and say:

> "In that case, this Court in effect determined that the damages of a shipper who had been charged discriminatory rates, were not to be measured by the amount of the preference extended to another shipper, but by the amount of the damage which the complaining shipper had sustained as the result of the preferential rates accorded to his competitor."

It is submitted that the case above cited does not sustain this statement of counsel for plaintiff-in-error, for the Court there said (at page 203):

> "The measure of damages was the pecuniary loss inflicted on the plaintiff as the result of the rebate paid. Those damages might be *the same as the rebate*, or less than the rebate, or many times

> greater than the rebate, but unless they were proved, they could not be recovered." (Italics ours.)

The damages of the defendants-in-error here were clearly proven before the Commission, and it found what those damages were, and it is no answer to this finding for the counsel for plaintiff-in-error to attempt to show that this amount measures the preferential treatment of the Berwind-White Company over the defendants-in-error in the car distribution. The record before the Commission is not before this Court. On the trial we agreed that the counsel for the plaintiff-in-error might put in the *entire record* before the Interstate Commerce Commission, but he declined to avail himself of this suggestion (Record, p. 73).

3. Counsel for plaintiff-in-error also say (p. 38) that the:

> "number of cars to which the defendants-in-error were entitled should have been ascertained with reference to the rule of distribution in force during the period of the action, and not with reference to a rule subsequently promulgated by the Interstate Commerce Commission."

The result of this proposition would seem to be that although the defendants-in-error may have been damaged by the unlawful discrimination practiced upon them, that they could not recover damages therefor, but could only recover damages for injury suffered, after the Commission had ascertained what, in its opinion, was a fair system of car distribution, if the carrier did not thereafter carry out the Commission's view. The practical result of an affirmance of this view would be so grotesque that we hardly think it necessary to further discuss it.

4. Counsel for plaintiff-in-error further say (p. 44):

> "Reports and orders of the Commission as a whole wrongfully admitted in evidence."

This contention of counsel for plaintiff-in-error is amply covered by the case of *Meeker vs. Lehigh Valley R. R. Co.*, and the case of *Mills vs. Lehigh Valley R. R. Co.*, above referred to.

5. Counsel for plaintiff-in-error say (Brief, p. 48) that the "award" is "invalid because of failure of Commission to find that the amount thereof was properly payable to the defendants-in-error."

Referring to the Record (p. 18), it appears that the first finding by the Commission is as follows:

> "We find that by reason of the discriminations ascertained and set forth in our report in Jacoby vs. P. R. R. Co., 19 I. C. C. 392, the complainants *were damaged to the extent of $21,094.39*, which they *are entitled to recover* with interest from June 28th, 1907." (Italics ours.)

It is urged, however, that the following appears at the close of the report (Record, p. 19):

> "We further find that the complainants in the sale of their mine, realized a profit of $7500 over the purchase price which they had paid. But we do not undertake to say whether or not this amount or any part of it should be deducted from the amount of reparation here awarded."

And it is argued that this last paragraph negatives the finding of the report that the "complainants were damaged to the extent of $21,094.39, which they are entitled to recover."

This same question of coal remaining in the ground as a subject of future sale, was considered by the Su-

preme Court of Pennsylvania in *Hillsdale Coal & Coke Co. vs. Pennsylvania R. R. Co.*, 229 Pa. 61, where the Court said (at page 68):

> "Counsel for appellant argue that because, as a result of defendant's discrimination, the coal of the plaintiff was left in the ground, and might be available for future shipment, and as there was no evidence that the prices which prevailed throughout the period of the action were abnormal, or in excess of those reasonably ruling, there was no room for the inference that the plaintiff would realize for its coal when it might be shipped in the future, less than it would have realized if shipped during the period of the action. But the burden was upon defendant, to show anything of this kind by way of mitigation of damages, if it could do so, and it offered no evidence for any such purpose."

In this case the plaintiff-in-error had the benefit of the Commission's finding of fact, but the jury did not consider that the sale of the property in any way affected the damages already sustained, and which had been found by the Commission. The matter was not made the basis of an objection to the supplemental report or award, and was not made the basis of a request for a charge or an assignment of error, and we submit that this case should not be reversed on that ground.

Respectfully submitted,

WM. A. GLASGOW, JR.,
Counsel for Defendants-in-error.